

Dec 27

19

C A S E S
IN
E Q U I T Y

DURING THE TIME OF THE LATE

Lord Chancellor TALBOT:

WITH
TABLES OF THE NAMES OF CASES,
AND
PRINCIPAL MATTERS.

The THIRD EDITION, with References to the Proceedings
in the Court, and to later Cases,

By JOHN GRIFFITH WILLIAMS
of Lincoln's-Inn, Esq. Barrister at Law.

L O N D O N:

PRINTED BY A. STRAHAN AND W. WOODFALL,
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1792.

These cases are by Mr Horner
as far as p 217 but no farther
so said by Ld Bathurst in Daw
v Ld Chatham

1st Edn. 1741

2d Edn with some references

1753 Folio

Lord Talbot Ld Chancellor

29 Nov 1733 he was succeed
ed by Lord Hardwicke feby 21
1736

Sir Peter King Ld King succeeded
Talbot he was appointed
June 1st 1725

" This collection is considered as the best
equity reports extant " Worrall

Rec. May 7, 1904.

LO

THE
P R E F A C E.

THE Proprietor of the following sheets is very sensible that they will, at first, appear in public under some disadvantage without the Author's name; but having (before he put them to the press) prevailed on some gentlemen of known judgment to read them in manuscript, who (without consulting together) were unanimous in the approbation of them, he no longer hesitated to risque the expence upon the merits of the collection; to which he was also induced by several other reasons.

First, There are but a few books of *Reports of Cases in Chancery*; insomuch that, before the publication of Mr. *Vernon's*, a gentleman must have attended that bar many years before he could, with justice to his clients, venture to give advice in equity-matters of difficulty.

Secondly, Those *Reports in Equity* which have been published, are mostly short notes of the state of the case, and the decree,

(often without any reason given), and one or both of these frequently imperfect; so that the reader must be a person of good experience in his profession, and must afford more than ordinary attention and consideration to many of them, to enable him rightly to understand their tendency, and so to make the proper use of them: but in this our collection it is hoped the cases are fully and truly stated, and the arguments of counsel, and the reasons given by the Court for making the decree are reported pretty much at large; as was the method of Mr. *Plowden*, Lord *Vaughan* and some others, in the common law, and is done in some few in *Chancery*; particularly in the three select cases, viz. The Duke of *Norfolk's* and two more. And here it may be proper to observe, that before the determination of that great case of the perpetuities*, almost all the great lawyers in *England* were of opinion against the point, as it was determined: but † since that time the whole profession seems to concur with that determination. To what can this be attributed so naturally as to the printing that case, and the arguments at large, whereby men had leisure to discern which were the arguments of art, and which of common sense?

* See the opinions of the counsel, and the arguments of the three chief judges in that case.

† See the case of *Lamb* and *Archer* in *Skinner* and *Salkeld*, 5 *W. & M.* and many other cases since of the like nature.

Thirdly,

P R E F A C E.

v

Thirdly, The cases here collected are of a very late date; therefore, if they be well taken, we have the authority of Lord *Coke*, concurring with reasons too plain to mention, that they must be the most useful.

Fourthly, They have been (except three or four) decreed by Lord *Talbot*, whose eminent virtues and abilities were so serviceable to his Prince and useful to his country, that the loss of him would have been reckoned a public calamity at least for one generation, if he had not (by a felicity peculiar to the reign in which he flourished) happened to have left his equal behind him. But we leave that topic to some abler pen; panegyric, how just soever, being neither our talent, nor present purpose; which is only to make some apology for publishing an anonymous work: and after what we have offered, we hope the *Cases* themselves, upon the perusal of them, will more effectually answer this end.

THE
P R E F A C E
TO THIS
THIRD EDITION.

THE following collection of cases is well known to have been taken from the notes of Mr. *Forrester*, a gentleman of considerable eminence in the profession in his time; and though originally published under no inconsiderable disadvantage, without the sanction of the author's name, has notwithstanding, from the moment it first met the public eye, been held in high estimation for the decisions contained in it, (many being upon points the most important) the distinguished ability of the judge who pronounced them, and the accuracy with which they have been communicated to posterity.

These reports having of late become difficult to be procured, a new edition of them was called for; in preparing which, the principal object has been to authenticate the correctness

of the several cases reported, by references to, and an examination of them, as they are found to be stated in the register's books. In making this research, the editor experienced the disappointment of not meeting with some of the cases; but they are few in number, and possibly may exist under different names, or different dates. Of those which he has met with, he can take upon himself to say, their statement in the report is correct, corresponding in all *material* respects with that in the record, or authority consulted.

In various pages of these reports, cases are found to be cited by both the bar, and the court, in support and confirmation of the arguments of the one, and decisions of the other; and many of those are cited, without any allusion to their correspondent properties, compared with the cases then immediately under discussion. It occurred therefore to the editor, that to subjoin a concise statement of the leading circumstances of so many of the cited cases as are found to be unexplained, and appear to have possessed weight in the judgment given by the Court, upon the points to which they respectively apply, *might* prove not unacceptable; such method having for its object the conveniency of the reader; to assist his judgment *at the moment*, by demonstrating to him at once the force and application of the cited cases, without the labour of a reference for that information to the several authorities containing them: at all events he conceived, that no
2 great

great inconvenience could possibly result from the insertion of such additional matter.

Since the original publication of these reports, many decisions have been pronounced, operating in their consequences either in affirmance, or denial of several of the cases herein considered. Those, the editor has endeavoured to collect, and to arrange in an order calculated to shew the times in which they were successively determined; and in many instances, where the importance of the subject seemed to require it, he has been induced to mention their principles, and general tendency. The original text (except in cases of manifest error) has been left entire; the pages have been preserved.

With these observations, it only remains for the editor to express his hopes, that, however presumptuous he may have been in the task which he has undertaken, or evident his defect in the execution of it, no injury has been offered by him to the merit of the original work, which, he trusts, his interference will be found not to have in any degree diminished or impaired.

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O F T H E

N A M E S O F T H E C A S E S .

Alphabetically disposed in such a *Double Order*, as that the Cases may be found by the Names of either of Plaintiffs or Defendants.

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- 9. 1. 4. in note (i) after *Evans v. Affley* read 3 *Burr.*
1570.
- 9. 1. 7. in note (c) after the words "and consequent-
ly" read "will consider, &c."
- 80. 1. 5. in note (p) for *Hampshire v. Pence* read
Hampshire v. Pierce.
- 80. 1. 4. in note (p) for *Which v. Litchfield* read *Ulrich*
v. Litchfield.
- 166. 1. 3. in note (a) for *Sale v. Thornton* read *Salvin v.*
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- 171. 1. 18. in note (h) for *Hay. ed.* read *Hargrave's ed.*
- 183. 1. 2. in note (g) for *directed* read *proceeded.*
- 201. 1. 1. in note (i) for *Galby* read *Galley.*

D E

Term. S. Michaelis

7 Geo. II.

IN CURIA CANCELLARIÆ.

Tyte versus Willis.

Case 1.

5 Dec.

GEORGE Tyte devised his lands, &c. to his wife Jane for life, remainder to his son Henry for life, remainder to his son George and his heirs for ever; and if he died without heirs, then to his two daughters Katherine and Jane.

A. devises lands to J. his wife for life, then to his son H. for life, then to his son G. and his heirs for ever; if he died without heirs, then to his two daughters K. and L. This is an estate tail in G.

The question was, Whether George took a fee-simple, or only estate-tail? And the case of *Webb and Herring, Cro. Jac. 415.* was cited, to prove that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is or may be the devisee's heir at law, such limitation shall be good; and the first limitation construed an intail, and not a fee, in order to let in the remainder-man: but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee-simple.

Lord Chancellor. In this case George took only an estate-tail. The difference which has been taken is right; and the reason of it is, that in the latter case there is no intent appearing to make the words carry any other sense than what they import at law; but in the former, it is impossible that the devisee

B

should

(2)

should die without an heir while the remainderman or his issue continue: and therefore the generality of the word *heirs* shall be restrained to *heirs of the body*; since the testator could not but know, that the devisee could not die without an heir while the remainder-man, or any of his issue, continued.
3 Mod. 123. (a)

Case 2.

The Countess of Ferrers versus Earl Ferrers.

ONE of the points in this case was to this effect:

Interest for the rents and profits of an estate, is never decreed: in what cases of an annuity or rent-charge, interest may be decreed or not; and for what reason? (b)

The countess dowager of *Ferrers* was, by settlement and will of her late husband earl *Robert*, in-

titled

(a) 1 Roll. Rep. 398, 399, 436. 3 Bulst. 192, 193, S. P. adjudged, and a diversity taken by the whole court when a remainder is limited to a collateral heir, and when to a mere stranger. *Allen v. Spendlove*, 2 Eq. Cas. Abr. 305. *Parker v. Thatcher*, 3 Lev. 70. *Nottingham v. Jennings*, 1 P. Will. 23. *Attorney General v. Gill*, 2 P. Will. 369. *Tilburgh v. Barbut*, 1 Ves. 89. where in a devise to one and his heirs, and if he died without heirs, remainder to his half brother, the devise was held a fee, and the remainder void, this being a devise over to a stranger, as the law considers him, and who could not in any wise inherit as heir to his brother (the first devisee). 3 Atk. 617. S. C. S. P. and admitted in *Goodright v. Dunham*, Doug. 264. *Morgan v. Griffiths*, Cowp. 234. *Hanson v. Ryldes Crown* ref 834

(b) The question, "Whether the arrears of an annuity or rent-charge are to be paid with interest," is in some degree discretionary in the court upon consideration of circumstances, and circumstances of weight are, when creditors cannot be paid their debts, if arrears are paid with interest, or when the payment of interest imposes an hardship upon an heir at law. *Morris v. Dillingham*, 2 Ves. 176. So the rule of the court for allowing interest for arrears of a jointure is not

titled to a jointure estate of 1000*l. per ann.* but was kept out of possession by earl *Washington*, the son of earl *Robert* by a former venter, and she now insisted upon the arrears and interest from the time of her husband's death; comparing it to the case of arrears of an *annuity*, or a rent-charge, which are decreed to be paid with interest.

Lord Chancellor. The arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or *nomine pænæ*, or some penalty upon the grantor, which he must undergo, if the grantee sued at law, and which would oblige him to come into this court for relief; which the court will not grant but upon equal terms; and those can be no other but decreeing the grantor to pay the arrears, with interest for the time, during which the payment was withheld: but interest for the rents and profits of an estate was never decreed yet, the sum being intirely uncertain. And though it may be said, that the lady is intitled to an estate of 1000*l. per ann.* yet that is not sufficiently certain; being only the perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in; some at one time, some at another.

(3)

not general, but the court will expect a special case to be made for that, as the being obliged to borrow money, and to pay interest for it, in which, as well as in the case of an annuity given by way of maintenance, the court will allow interest from a reasonable time, and that, whether the annuity is charged upon a real estate, without any power of entry, (if in arrear) or is secured upon a penalty to inforce the payment out of a personal estate. *Litton v. Litton* 1 *P. Will.* 542. *Batten v. Earnley*, 2 *P. Will.* 163. *Robinson v. Cumming*, 2 *Atk.* 411. *Newman v. Auling*, 3 *Atk.* 579, 2 *Ves.* 662. *Anon.*

Stapleton v. Conway 1 *Ves.* 428. *The*
Drapers Comp. *Bothers v. Davis* 2 *Atk.* 212

Case 3.

14 Decemb.
1735.

Micklethwaite v. Calverly and Baker.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo*: for the first can not be argued now.

THE plaintiff filed his bill in this cause, to which the defendant *Baker* pleaded; and before the plea came on to be argued, the defendant died; the plaintiff revived, and now the said plea came to be argued: But the *Lord Chancellor* was of opinion, that it could not be argued; but that the defendant's representative must plead *de novo*.

N. B. The reason seems to be, because the representative may have a plea to defend him without denying the merits; for if an executor or administrator can truly plead *plene administravit* upon a *scire facias* at law (which must always issue in such case) the execution can only be *de bonis testatoris quando acciderint*.—But the answer of the testator, in a court of equity, will bind the executor who has assets.

Case 4.

Lord Glenorchy versus Bosville.

(• 4)

A. devises lands to his sister *B.* and *C.* and their heirs and assigns, upon trust, that until his grand-daughter *D.* should marry or die, to receive the profits, and thereout to pay her 100*l.* a year for her maintenance; the residue to pay debts and legacies.

SIR *Thomas Persball* devises all his real estate to his sister *Anne Persball* and *Robert Bosville*, and their heirs and assigns, upon trust, that till his grand-daughter *Arabella* Persball* marry or die, to receive the rents and profits thereof, and out of it to pay her 100*l.* a year for her maintenance; and as to the residue, to pay his debts and legacies; and after the payment thereof, then in trust for his said grand-daughter; and upon further trust, that if she lived to marry a protestant of the church of *England*, and at the time of such marriage be of the age of twenty-one, or upwards; or if under the age of twenty-one, and such marriage be with the consent of her aunt, the said *Anne Persball*; then to convey the said estate with all convenient speed after such marriage, to the use of the said *Arabella* for life, without impeachment of waste, voluntary waste in houses

houses excepted; remainder, after her death, to her husband for life; remainder to the issue of her body, with several remainders over; and upon further trust, that if the said *Arabella Pershall* die unmarried, then to the use of the said *Anne Pershall* for life; remainder to the son of his other granddaughter *Frances Ireland* in tail; remainder to Mr. *Bosville*, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and upon further trust, that if his granddaughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said *Arabella* for life, remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a protestant, with several remainders over; and as to the other moiety, to his daughter *Ireland's* son, in like manner.

After payment thereof, in trust for the said *D.* and upon further trust, that if she lived to marry a protestant of the church of *England*, and at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said

B. then to convey, with all convenient speed, after such marriage, to the use of the said *D.* for life, *sans waste*, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; and upon further trust, that if the said *D.* die unmarried, then to the use of *B.* for life; remainder to the son of his other granddaughter *E.* in tail; remainder to the defendant *C.* remainder to his first and other sons; remainder to *A's* right heirs; and upon further trust, that if *D.* marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of *D.* for life, then to trustees to preserve contingent remainders: remainder to her first and every other son, being a protestant, with remainders over; and as to the other moiety, to the son of his daughter *E.* in like manner. *A.* dies, *D.* attains her full age; and upon a treaty of marriage with *F.* applies to *B.* and *C.* for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body: *B.* executes such conveyance, but *C.* refuses; *D.* suffers a recovery of the whole to the use of herself in fee, and then marries *F.* who made a considerable settlement upon her; the covenants to settle her estate upon husband and wife; remainder to first, &c. sons in tail: remainder to survivor of husband and wife in fee. They bring a bill to compel *C.* to convey, &c. decreed (not an estate tail to *D.*) but an estate for life *sans waste*, *ut supra*, as being the intent of *A.* upon the will with remainders over in strict settlement.

Sir *Thomas Pershall* died in the year 1722, and (5)
Mrs. *Arabella Pershall* in 1723, attained her full

B 3

age:

age: and upon a treaty of marriage in 1720, she applies to the trustees for a conveyance of the estate to herself for life; remainder to her intended husband for life, remainder to the issue of her body; and such conveyance was executed by one of the trustees: but Mr. *Bosville*, the other trustee, who was also a remainder-man, refused to convey. However, she having by this conveyance a legal estate tail in one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730, married the plaintiff, the Lord *Glenorchy*, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord *Glenorchy* and herself for life; remainder to the first and every other son of the marriage in tail male; and upon failure of such issue, to the survivor of the said husband and wife in fee.

The bill was to have a conveyance of the moiety of the said trust estate from Mr. *Bosville*, to such uses as are limited by her in the said covenant: And the principal question was, whether under the said will the Lady *Glenorchy* was tenant for life or in tail? Upon which two other questions arose, *viz.* first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the court will make any difference between a legal title, and a trust estate executory?

Lord Chancellor. I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise; but when you apply to this court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law to follow the testator's intent? which will also bring on another question, what is the testator's intent in the present case?

(6) Upon the second question, it was argued for the plaintiffs, that the Lady *Glenorchy* was, under this will,

will, intitled to an estate tail in equity: for, this court puts the same construction upon limitations of trusts in equity, as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of Nottingham (a) in the Duke of Norfolk's case; and the authority of *Baile versus Coleman*, 2 Vern. 670, (b) where a trust to one for life, remainder to the heirs male of his body, is held an estate tail, has never yet been questioned. So it is held in *Legat and Sewell's case*, 2 Vern. 551, (but more fully (c) reported in *Abr. Eq. Ca.* 394.) where money was given to be laid out in land to one for life, and after his decease, to his heirs male, and the heirs male of the body of every such heir male, severally and successively one after another; and a case being made for the opinion of the judges, as of a legal estate, they certified it to be an estate tail (d). So in the case of *Bagshaw v. Downes*, or *Bagshaw v. Spencer*, at the Rolls, Hill. 6 G. 2. an executory trust was directed to the judges for their opinion as a legal estate. Upon the same reason do *cestui que trusts* (e) levy fines and suffer recoveries, which are held good in this court. Indeed, in marriage articles, if they covenant to settle

(a) *Select Cas. in Chanc.* 1.

(b) 1 *P. Will.* 140. S. C.

(c) 1 *P. Will.* 87. S. C.

(d) Held by three judges against one, to be an estate tail, Tracey J. dissenting, holding it to be but an estate for life, 1 *P. Will.* 87.

(e) *Clifford v. Ashley*, 1 *Cha. Cas.* 268. *Salisbury v. Baggot*, *ibid.* 278. *North v. Champenon*, 2 *Cha. Cas.* 63. 1 *Vern.* 13. 1 *P. Will.* 91. *Cruise upon Fines* 187—190, but recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainder expectant thereon; and do not affect any legal estate; so that a legal remainder cannot be bound by an equitable recovery. *Robinson v. Cumming*, 167. *post.* *Salvin v. Thornton* cited *Brown's Cas. in Chanc.* 73. *Shapland v. Smith*, *Brown's Cas. in Chanc.* 75. S. P. 2 *Chan. Cas.* 64. *Cruise upon Recoveries*, 239, 240-1.

to the husband for life, remainder to the heirs of their two bodies, this court will decree a conveyance in strict settlement, if any of the parties (a) apply here; because the children are looked upon as purchasers: but in a will it is otherwise; they take through the bounty of the testator, and in such words as he gives it.

(7) It was farther insisted for the plaintiffs, that the words *issue of her body*, would make a difference from all other cases; for, in the statute *de donis*, which created intails, it is said to be a proper word for that purpose, and is used no less than ten times in that statute; for this the authority of *King and Melling*, (b) 1 Vent. 214, 225, and the reason there given, cannot be contested; which is also an authority in the principal case: for, there it is held, that to one for life, with a power to make a jointure, is much stronger to shew the intent of the testator, than the words *without impeachment of waste*. To A. for life, remainder to the issue of her body, and for want of such issue, remainder over, was held an estate tail in the court of exchequer, in the case of *Williams versus Tompson*, about three or four years ago. *Andersf.* 86. To one for life, remainder to the children of his body, is an intail. So in *Wyld's case*, 6 Co. 16. and *Sweetapple (c) versus Bindon*, 2 Vern. 536.

It

(a) *Trevor v. Trevor*, 1 P. Will. 622. *Honor v. Honor* ed. 125. *West v. Erisley*, 2 P. Will. 349.

(b) Where one devising lands to A. for life, remainder to his issue male by his second wife, it was adjudged an estate tail in A. and that his recovery barred all the remainders. *Vid.* also 1 Vent. 230. 1 Mod. 54. *Love and Wyndham's Case*.

(c) A. devised 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if she died without issue, to go over; and she married B. and had a child by him, and she and the child being dead, and the money not

It was farther argued, that if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity: for, in what manner can the issue take? All the sons, daughters, and grand children are issue; and if they take as purchasers, they must be jointenants, or tenants in common, and that for life only, 2 *Vern.* 545. (a) Which construction can never be agreeable to the testator's intent; and whatever estate was given in the first part of the will, yet the words, *and for want of such issue, then, &c.* will give the plaintiff an estate tail, according to the cases of *Langley versus Baldwyn*, (b) and *Shaw and Weigh, Eq. Cas. Abr.* 184. Pl. 28, 29. It was also farther urged, that from the face of the whole will, and by comparing this clause with the other, it appears, that the testator intended the plaintiff, the Lady *Glenorchy*, should take an estate tail; and that the several clauses in a will are to be taken together, and make but one conveyance; and that it was a proper argument to prove the intention of the party from the different penning of the several clauses.

not laid out; on a bill being brought by *B.* the money decreed to be considered as land, and the plaintiff to be tenant by the curtesy.

(a) *Cook v. Cook.*

(b) Was a case referred out of chancery to the judges of the common pleas during the time of Lord *Trevor's* presiding in that court, where there was a devise to *A.* for life without waste, with a power for him to make a jointure, remainder to his first, second, and so to his sixth son (and no further) after which followed the words, (if *A.* should die without issue male of his body, then to *B.* in fee); and in that case it was resolved by all the judges of *C. B.* that there being no limitation beyond the sixth son, and for that there might be a seventh and subsequent sons to take, (but still to take as issue and heirs of the body of *A.* in tail by descent and not purchase) the court held the words, "in case *A.* should die without issue male of his body," did, in a will, make an estate tail, *vid. also, Attorney General v. Sutton, 1 P. Will.* 758.

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The person who drew the will knew how to convey, either by words of limitation or purchase, where there was occasion for it; for, where he limits the estate to Mrs. Ireland, it is in strict settlement by proper words of purchase; and so, where he limits it to the Lady Glenorchy, in case she had married a papist. But farther, to shew he well understood the doctrine of conveyances, when he limits by words of purchase to sons not in *esse*, he has put in trustees, to preserve contingent remainders; which he would certainly have done in this case, had he intended the Lady Glenorchy an estate for life only.

For the defendant it was argued, that though, in the construction of wills in this court, uses and trusts are to be governed by the same rules as legal estates, and that there is but little difference between uses and trusts executed and legal estates; yet trusts executory, (a) are by no means under the same consideration. In the cases of *Legat versus Sewell*, and *Baile versus Coleman*, the judges were divided in their opinions; and since that time there is an express authority for the defendant. In the case of *Papillon versus Voyce*, (b) *Hill. 5 G. 2.* So likewise in the case of the *Attorney General versus Young*, in the court of *Exchequer*: and the case of *Leonard v. Earl*

(a) But in the case of *Bagshaw v. Spencer* 1 *Ves.* 142, Lord *Hardwicke* strongly expresses his doubts of there being any difference between trusts executed and executory, and seems to intimate that this distinction has never been established by any direct resolution, though said *arguendo*.

(b) *A.* devised 10,000*l.* to trustees in trust to be laid out in lands and to be settled on *B.* for life, without waste, remainder to trustees and their heirs for the life of *B.* to support contingent remainders, with a power to *B.* to make a jointure, remainder to the heirs of the body of *B.* remainders over, and by the same will devises lands to *B.* to the same uses, and dies leaving *C.* executor. *B.* sues *C.* the executor for the deeds relating to the lands that are in his hands, and to have the money laid out in lands to be settled.

Decreed

Earl of *Suffex*, (a) 2 *Vern.* 526, as also in the case of *Brampston* versus *Kinaston*, heard at the Rolls in June 1728. where an estate was given to be settled upon his grand-child for her life; remainder to the issue of her body: and when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. And to shew that this court is not tied up to the rules of law in cases of executory trusts, the case of the Earl of *Stamford* versus Sir *John Hobart*, concerning Serjeant *Maynard's* will was cited, (b) where an estate was given to trustees, to convey one moiety to Sir *John Hobart* for 99 years, in case he should so long live, with several remainders over; and this court decreed the Master should settle the conveyance according to the letter of the will; but upon exceptions to the Master's report, November 19, 1709. it was ordered, that proper estates should

Decreed by the *Master of the Rolls* that *B.* had but an estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on *B.* for life, remainder to his first, &c. son. But by Lord Chanc. King, *B.* was decreed to have an estate tail in the lands devised, and consequently to be intitled to the deeds relating thereto; though as to the lands being purchased, that being executory, and in the power of the court, *B.* was to be but tenant for life, with remainder to his first, &c. son. 2 *P. Will.* 471. And vide the note at the end of the case.

(a) In which case *A.* devises lands to trustees to pay debts and legacies, and then to settle the remainder on her son *B.* and the heirs of his body, remainder over; and directs that special care should be taken in the settlement, that it should never be in the power of her son to dock the intail; decreed the son should be only tenant for life without impeachment of waite, and should not have an estate tail conveyed to him.

It is probable that Lord *Talbot* had this case in view when he determined *Glenorchy v. Bosville*, but in the former it was clear that the testatrix intended her son should take an estate for life only.

(b) See this case more fully stated in *Bagshaw v. Spencer*, 1 *Ves.* 149. And in *Fearne's Contingent Remainders*, ed. 4. 169—173.

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be made to support the remainders, that the testator's intent might not be frustrated; and this resolution was affirmed in the House of Lords. So in all matters executory, this court endeavours to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements it was never doubted but that this court would carry any words into strict settlement, if the intent of the parties was such; and so held in the case of *West versus Erissey*, (a) in the House of Lords; and in that of *Trevor versus Trevor*, *Abr. Eq. Ca.* 387. and the same rules will prevail in all cases executory, whether wills or articles. Besides, the present case is very much like that of marriage articles: the testator had all along the marriage of his grand-daughter in view, and intended this will as no more than heads or directions for the trustees in what manner he would have it settled; and so it remains to be carried into execution by the aid of this court.

Then as to the word *issue*, it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in *Wylde's case*, 6 Co. 16. where *to one and his children*, is held to be an estate tail; yet, had it been *to one for life, remainder to his children*, there can be no doubt but that it had been a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, Why shall it not be as in cases where the limitation is to the first and every other son? And

(a) *Ante* 6. The court anxiously distinguished those cases from cases arising upon wills, and determined them to be estates for lives upon three grounds; first, because they are upon valuable consideration; secondly, because they are to be carried into execution against the parents; thirdly, that if the party took an estate tail, the uses would be defeated, and, consequently, the children put completely into the power of their parents.—It is otherwise (says Lord Harcourt, in *Baile v. Coleman*) in the case of wills, which have not been construed upon the same grounds.

where-

where-ever *heirs of the body* are held to be words of purchase, they are construed to the first and every other son.

To make an estate-tail arise by implication upon the words, *and for want of such issue*, has been cited the case of *Langley and Baldwyn*, 1 *Eq. Cas. Abr.* 185. But there is the case of *Bamfield (a)* versus *Popham*, 2 *Vern.* 427, 449. for the defendant: so the case of *Loddington and Kyme*, 3 *Lev.* (b) 431. and that of *Backhouse and Wells*, 1 *Eq. Cas. Abr.* 184. Besides, it is a general rule, that where an estate is to be raised by implication, (c) it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever; and in the present case, there is the word *issue* mentioned before; so that these last words must relate to the issue before mentioned: Whereas in the

(a) In which case a devise was to *A.* for life, remainder to his issue, and if he died without issue, then to another, yet resolved that *A.* had an estate for life only, in regard the words were exprefs.

(b) Determined *Hil. 12 Ann.* B. R. during the time that Lord *Macclesfield* presided there, where the case was, that *A.* seised in fee devised the premises to *B.* to hold to him for the term of his natural life only, without impeachment of waste; and from and after his decease, to the issue male of his body, and to the heirs males of such issue male; and for want of such issue, remainder over: and it was adjudged that *B.* took but an estate for life, the estate being given to him for life only, and there was a limitation afterwards to the heirs male of his issue, which was a description of the person who was to take the estate tail.

(c) In the case of *Robinson v. Robinson*, 1 *Burr.* 44. the cases upon this subject are collected. *Vide* also *Allanson v. Clitherow*, 1 *Vesf.* 24. *Lethieullier v. Tracy*, 3 *Atk.* 784. *Evans v. Astley*, 1570. From all which cases it seems, that in the construction of words of this kind to effectuate the general manifest intention of the testator, will be the aim of courts both of law and equity, and consequently consider the raising estates by implication as depending upon such implication being necessary to effectuate that intention.

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case of *Langley* and *Baldwyn*, the limitation is to fix sons only; then come the words, *and for want of issue*; which words could not have relation to any thing before mentioned.

The *Lord Chancellor* had taken time to advise, and to have the opinion of the Judges upon this case: And the same coming now again to be argued upon the same points that had been before the late *Lord Chancellor*,

It was insisted by the plaintiff's counsel, that the Lady *Glenorchy*'s marrying a protestant of the church of *England*, at or after the age of twenty-one, or if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which, when performed, would give her an estate tail. — That this intent appeared from the different penning of the several clauses in this will; for, it provides, in case she should not marry such a person as is before described, that she should have but a moiety for life, and trustees are appointed to preserve contingent remainders; none of which are enjoined in case she should marry a protestant of the church of *England*; which shews a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail; and so it was held in the case of *King* versus *Melling*, 1 *Vent.* 214, 225. notwithstanding the proviso there, empowering the devisee to make a jointure: So if in this case the land itself had been devised to the Lady *Glenorchy*, it would have made an intail at law; and there is no difference between an intail of a legal estate and of an equitable one. *Wyld's* case, 6 *Co.* 16. Devise to a man and his children, who had then two children alive, the devisee took but for life; but in *King* versus *Melling*, 1 *Vent.* 214, 225. *Lord Hale* said, that had there been no children living,

living, in that case of *Wyld*, it would have been an estate tail; though *children* be not so strong a word as *issue*; which in many statutes, particularly the statute *de donis*, takes in all the children. In *Shelley's* case, 1 *Co.* it is said, that if there be a gift to one for life, be it by deed or will, and afterwards comes a gift to the heirs of his body, it is an intail; otherwise indeed, if the limitation be to *the heirs male of such heir male*, as in *Archer's* case, 1 *Co.* there it would make but an estate for life; because the limitation there is grafted upon the word *heirs*. So in the case of *Backhouse and Wells*, (a) in *B. R.* 1712. 1 *Eq. Caf. Abr.* 184. the devisee took but for life, the limitation being there grafted upon the word *issue*; which for that reason was taken to be only a description of the person in that case; but in *Cozen's* case, *Owen* 29. and in *Langley versus Baldwyn*, 1 *Eq. Caf. Abr.* 185. the estate tail was raised by implication; which shews that an estate tail may pass not only by express words, but by implication also. In *King and Melling* the Lord *Hale* said upon *Wyld's* case, that had it been to the children of the body, it would have passed an intail; and yet none of those cases seem so strong as the present. So in the case of *Cook versus Cook*, 2 *Vern.* 545. it is said, that a devise to one and his children, if there be no children living, will be an estate tail.

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(a) In this case there was a limitation to one for life only, and after his decease to the *issue male of his body*, and to the *heirs male of the bodies of such issue*: and here besides the respective word *only*, the limitation was to *issue male*, with words of limitation grafted thereon. And it is to be observed, that the word *issue* itself, even unattended with any engrafted words of limitation, is often a word of purchase, where the word *heirs*, (or even *heir*, in the singular number) is not. And in this case, Lord Chancellor *Parker* observed, that if the words *heirs male* had been used instead of *issue male*, the operation of the law would have been too strong for the testator.

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The exception of waste is next to be considered; and had it not been for that, this would clearly have passed an intail; but this exception varies not the case: For here the estates must disjoin (according to *Bowles's case*, 11 Co.) to let in the husband's estate, which must intervene between her estate and that of her issue; and the power of committing waste (voluntary waste in houses excepted) was given only to make her punishable of waste during the time she should be tenant for life only; which she must be until her husband's death, by reason of the remainder to him; but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words, *without impeachment of waste*, can alter nothing; for if she was tenant in tail, she had already in her that power which these words would give her; and the expressing the power which was already in her, could no more abridge her estate (according to the maxim of *expressio eorum, &c.*) than the power of making the jointure did in *King and Melling's case*. In *Langley and Baldwyn's case* there were the same words as here; and in that of *Shaw and Weigh*, or *Sparrow versus Shaw*, *Abr. Eq. Ca.* 184. which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail; which was a much stronger implication, to make the sister to be but tenant for life, than any in the present case. And in *Baile and Coleman's case*, 2 *Vern.* 670. an estate tail was decreed by the Lord *Harcourt*, notwithstanding the power of leasing given to *Christopher Baile*: Nor can the other words, *voluntary waste in houses excepted*, carry the implication farther than the former; since this court will often restrain a tenant for life without impeachment of waste from committing waste, notwithstanding his power; as was declared by the Earl of *Nottingham* in *Williams and Daye's case*, 2 *Ch. Ca.* 32. who there said, that he would stop the pulling down of houses, or defacing a seat, by tenant in tail, after possibility of issue extinct,

tinct, or by tenant for life, though dispunishable of waste by express grant or by trust; and the like has been since done in the case of *Vane* versus Lord *Barnard*, (a) 2 *Vern.* 733. By comparing this with the other clauses of this will, it appears plainly that the testator did not intend the Lady *Glenorchy* by a less estate than to the other devisees; but that his design was to prefer her and her issue to that of Mrs. *Frances Ireland*, though *Frances* was dead at the time of the will; and that her son, who could expect no more favour than his mother could, had she been living, should not have an immediate estate tail, and so a greater estate than she who was intended to be most preferred. It is plain the testator well knew the difference between giving an estate for life and an estate tail, by the different wording of the clauses of this will: In that, whereby he devises the remainder to Mr. *Bosville*, these words are purposely omitted; and in others he gives the Lady *Glenorchy* several estates, according to her marrying such or such persons, protestants or papists; and consequently he must be thought to have intended her a greater estate upon her performing than upon her not performing the condition. If therefore these words would create an estate tail at law, the construction will be the same here, since a court of equity ought to go farther than the courts of law; as was held by Lord *Cowper* in the case of *Legat* and *Sewell*, 2 *Vern.* 551. 1 *Eq. Cas. Abr.* 395. and was also held by Lord *Harcourt* in the case of *Baile* and *Coleman*, 2 *Vern.* 670. where he takes a difference between cases arising upon wills, and cases arising upon marriage articles; where the persons being

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(a) *Prec. in Chanc.* S. C. *Bishop of London v. Webb*, 1 *P. Will.* 528. *Sir H. Packington's Case*, 3 *Atk.* 215. *Perrot v. Perrot*, 3 *Atk.* 95. *Aston v. Aston*, 1 *Ves.* 264. *Chamberlain v. Dummer*, 1 *Bro. Cha. Rep.* 166. *Earl Bathurst v. Burden*, 2 *Bro. Cha. Rep.* 64.

all purchasers, the agreement is to be carried into stricter execution than in the case of a will; where the parties being but volunteers, the words must be taken as you find them. The same is held *totidem verbis* in the case of *Sweetapple versus Bindon*, 2 Vern. 536. where it is said, that in a devise, all being volunteers, the devisee's estate is not to be restrained; nor is there any argument to be drawn from this being an executory trust, since the case of *Baile versus Coleman* was such, and looked upon as such by the Lords *Cowper* and *Harcourt*. And the case of *Leonard versus Earl of Suffex*, 2 Vern. 526. is widely different from ours; for, there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

(14) It was argued for the defendant by Mr. *Attorney General*, Mr. *Verney*, and Mr. *Fazakerly*, that the Lady *Glenorchy* could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cozens*, and of *Cook versus Cook*; which were legal estates, and executed. The resolution in *Sonday's case*, 9 Co. 127. b. (which was likewise of a legal estate) was chiefly founded upon the *proviso*, restraining the son or his issue from aliening; which made the argument that he was intended by the testator to be tenant in tail; since if he had been but tenant for life, the restraint had been vain and needless. In the case of *Langley versus Baldwyn*, an estate tail was raised by implication upon the words, *if he die without issue male*; because the devise extending no farther than the sixth son, no son born after could have taken; but the heir at law must have been preferred: whereas his intent was to provide equally for all his sons; and therefore the raising an estate tail by implication (besides that it was in the case of a legal estate) was carrying the testator's intent into execution. The case of *King versus Melling* has indeed gone very far; but has always been

been looked upon as the *ne plus ultra*, beyond which no court would ever go. This appears from the resolution in the case of *Backhouse* versus *Wells*, where the party's intent prevailed against the doctrine now insisted on: but it is said, the word *issue* is always a word of limitation. In that of *Sweetapple* versus *Bindon*, the words did of themselves carry an estate tail, and there was no intent appearing to the contrary. And in *Legat* versus *Sewel*, one judge was of opinion it was but an estate for life; and that case was afterwards agreed.

The difference which was insisted on in the former argument, and is still strongly relied on for the defendant, between legal estates and trusts executed, and trusts executory, is evident, and appears plainly from the case of *Leonard* versus *Earl of Suffex*; where the words were much stronger to create an estate tail than they are here; but yet in that case the court declared, that it being a trust executory, the provision should be looked upon as strong for the benefit of the issue, as if it had been in marriage articles; and that the testator's intent (appearing by the subsequent words, *that none should have power to dock the intail*) should be observed, therefore decreed but an estate for life. This difference appears likewise from the cases of *White* versus *Thornborough*, 2 *Vern.* 702. and *Trevor* versus *Trevor*, *Eq. Ca. Abr.* 387. and from that of *Papillon* versus *Voyce*, *Hil.* 5 *G.* 2, which is not distinguishable from our case, except that there were trustees appointed in that case to preserve contingent remainders, which are not in this: but notwithstanding that provision, the late *Lord Chancellor* declared in that case, that the limitation, had it been by act executed, would have created an estate tail; but that the trust being executory, and to be carried into execution by the assistance of this court, he would keep the parties to the observance of the testator's intent; which plainly governs the present case; and by all those it appears that the testator's intent is as much to be observed

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in cases of executory, as of marriage articles. If therefore the testator's intent is to be observed, and that no words which may have any operation are to be rejected, it plainly appears from this and the other clauses of this will, that Sir *Thomas Pershall* intended this lady only an estate for life. It is true indeed, that the word *issue* in a will is generally a word of limitation, and creates an estate tail; but that is only where no intent appears to controul it: And in every clause of this will, where he intends only an estate for life, he mentions the words *for life*; and where he intends an estate tail, there is not a word mentioned of *impeachment of waste*; which shews he knew what he was doing when he inserted this exception, and was not ignorant of the operation these words would have on the several estates. And these words were, in the case of *Loddington* versus *Kyme*, 3 Lev. 431. taken to be a strong implication of the testator's meaning to give but an estate for life, notwithstanding the other words, which seemed to carry an intail. Nor is there any colour for what has been insisted on for the plaintiff, that the power of committing waste, with the restraint of voluntary waste in houses, was designed only to attend on her estate for life, till by her husband's death she should come to be tenant in tail; since no more could be meant by it than to restrain her from defacing or pulling down houses while she was in her husband's power, the testator not knowing who her husband might be. This power of committing waste has been compared to the power of leasing in the case of *Baile* versus *Coleman*, tho' they are widely different; nor can it be compared to that of making a jointure in *King* and *Melling's* case: for, since tenant in tail cannot make a jointure without a recovery, the power was as proper to be annexed to an estate tail as to an estate for life; which was one of the reasons of Lord *Hale's* opinion in that case. In our case, to serve the intent of restraint of waste in houses, she must be decreed but an estate for life; if it be an estate tail, she will be enabled

enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary: nor will the answer that has been given to this, that she might be restrained in this court, avail; since no instance can be shewn where a tenant in tail has been restrained from committing waste by injunction of this court.

[*Lord Chancellor.* That was refused in Mr. *Saville's* case of *Yorkshire*; who being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death, to a very great value; the remainder-man applied here for an injunction to restrain him, but could not prevail.]

The other objection, that Sir *Thomas Pershall* could never intend the Lady *Glenorchy* a less estate than the children of his other grand daughter *Frances Ireland*, turns rather against the plaintiff; for, the testator's intent was to provide for the Lady *Glenorchy's* children, preferably to those of *Frances Ireland*; and therefore he makes the lady herself but tenant for life, and her children tenants in tail. Nor is any thing more common than to limit an estate for life only to the first taker; by which the intent of providing for children is better answered than if the first taker was made tenant in tail: nor will there in this case follow the inconvenience that has been mentioned, by making the issue to be purchasers, viz. that the issue must take jointly, and take estates for life only; for if issue be *nomen collectivum*, as has been insisted for the plaintiff, why may it not be so, as well where they take by purchase, as where they take by limitation? especially where the testator's intent, that they should take successively, and by seniority of birth, is as well served by their taking one way as the other?

And if the word *issue* (b) be tantamount to the word *heirs*, as it has been agreed to be, they have answered themselves. In the case of *Burchet* versus *Durdant*, (c) 2 Vent. 311. and in 2 Lev. 232. by the name of *James* versus *Richardson*, the words *heirs of the body* were held to be words of purchase, by reason of the words *now living*, which came just after, and yet were at the same time determined to carry an estate tail, the word *heirs* being *nomen collectivum*: And if so in case of a legal estate executed, much more ought this construction to hold here; this will being meant by the testator only as heads of a settlement to be made; and so may well be thought not to have been so accurate in the wording as if the conveyance were then to have been drawn up with advice of counsel, and all other assistances to make it formal.

Lord Chancellor Talbot. Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously in many if not in all of them. It is plain, that by the first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give any opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a protestant: the trustee therefore, by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

(b) With respect to the operation of the word "issue," vide *Backhouse v Wells*, 1 Eq. Cas. Abr. 184. pl. 27. *Loddington v. Kime*, 1 Raym. 203. *Meure v. Meure*, 2 Atk. 265. *Ahton v. Ahton* (cited) 1 Ves. 149. *Goodtitle v. Otway*, 2 W. J. 6.

(c) So *Goodright v. White*, 2 Bla. Rep. 1010. Vid. also *Darbyson v. Beaumont*, 1 P. Will. 229. *Fearne's Contingent Remainders*, 4th edit. 319.

But the great question is, What estate she shall take? And first, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband: but then come the words, *remainder to the issue of her body*, upon which the question arises: the word *issue* does, *ex vi termini*, comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive, &c. That it may be a word of purchase is clear from the case of *Backhouse* versus *Wells*, and of limitation, by that of *King* versus *Melling*; but that it may be both in the same will, has not, nor can be, proved. The word *heirs* is naturally a word of limitation; (d) and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word *issue* be looked upon as both in the same will, what a confusion would it breed! for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, Whether Sir *Thomas Pershall* intended the Lady *Glenorchy's* issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession *ad infinitum*, a perpetuity of estate for life. This inconvenience was the reason of Lord *Hale's* opinion in *King* and *Melling's* case, that the limitation there created an estate tail. It may be, the testator's intent is by this construction rendered a little precarious; but that is from the power of the law over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be

(18)

(d) But in what cases words of limitation have been construed words of purchase, Vid. *Doe v. Laming*, 2 Burr. 1108. *Bayshaw v. Spencer*, 1 Ves. 147. and the cases there cited, 2 Atk. 571. S. C.

estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate: no, the power shall be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King* and *Melling's* case, where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one: so the applying this power to the estate for life carries no incongruity with it. As the case of *King* and *Melling* has never been shaken, and that of *Shaw* and *Weigh*, or *Sparrow* and *Shaw*, which went up to the House of Lords, was stronger, I do not think that courts of equity ought to go otherwise than the courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

- (19) But there is another question, *viz.* How far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made: but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner. The case of *Leonard* and the *Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but being an executory trust, the court decreed according to the intent as it was found expressed in the will, which must now govern our construction. And though all parties claiming under this will are volunteers, yet are they intitled to the aid of this court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniencies which were the foundation

foundation of the resolution in *King and Melling's* case; and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, *viz.* to the lady *Glenorchy* for life, remainder to her husband the lord *Glenorchy* for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford* and *Sir John Hobart*, Dec. 19, 1709, it appeared, that for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the act of parliament to take effect, might have been avoided; and therefore the Lord *Cowper* did, notwithstanding the words of the act, upon great deliberation, insert trustees. In the case of *Legat* and *Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile* and *Coleman* the execution was to be of the same estate he had in the trust, which in construction of law was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon* and *Voyce* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other. (e)

(20)

And so decreed (f) the Lady *Glenorchy* but an estate for life, with remainder, &c.

Legg

(e) *Vide* all the principal cases on limitations of this nature, collected and arranged by Mr. *Cox* with the utmost accuracy and judgment, in his note (2) upon *Bale v. Coleman*, *supra*.

(f) This case appears to have been decided upon the principle of a distinction existing between *legal and equitable estates*, and between trusts *executed and executory*; Lord *Talbot* admitting the word "issue" in a will to be as proper a word of limitation as "heirs of the body," and that he should upon the first question have made no difficulty of determining

Legg versus Goldwire.

Nov. 10,

1736.

Case 5.

N. B. By Lord Chancellor, where articles are entered into before marriage, and settlement made after marriage different from those articles (as it by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue) this court will set up the articles against the settlement:

termining it an *estate tail*, had it been the case of an immediate devise. He thought, in cases of *trusts executed*, or immediate devises, the construction of the courts of law and equity ought to be the same, for *there* the testator did not suppose *any other conveyance* would be made; but in *executory trusts* he left something to be done, the trusts *to be executed in a more careful and accurate manner*. But from several modern cases, it seems as if this distinction no longer prevailed; that a court of equity is as much bound by positive rules and general maxims concerning property as a court of law is, and that whatever is sufficient upon a devise to make an exception out of the rule holds as well in the case of a legal as in that of a trust estate—that if a testator make use of legal phrases and technical words *only*, the court are bound to understand them in the legal sense, but that if he use other words which *indisputably* discover his intention, and shew to *demonstration* that he did not mean what the technical words import, that intention must prevail, and which rule is applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words—that the intention of a testator, if contrary to the rules of law, can no more take effect in a court of equity than in a court of law; but if, on the contrary, the intention be not contrary to law, a court of common law is as much bound to construe and effectuate that will, according to the intention of the testator, as a court of equity can be. *Garth v. Baldwin*, 1 *Ves.* 646. *Wright v. Pearson*, *Ambl. Rep.* 358. (but more particularly stated in *Fearne's Contingent Remainders*, 4th edit. 187.) *Austen v. Taylor*, *Ambl. Rep.* 376. *Doe v. Laming*, 2 *Burr.* 1108. *Hodgson v. Ambrose*, *Dougl. Rep.* 340. *Jones v. Morgan*, 1 *Bro. Cha. Rep.* 206. However, the distinction laid down by Lord Talbot, has

ment: (g) But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall controul the articles. And altho' in the case of *West and Erissey*, (*b*) *Mich.* 1726. in the court of *Exchequer*, and afterwards in the *House of Lords* in 1727. the articles were made to controul the settlement made before marriage; yet that resolution no ways contradicts the general rule; for in that case the settlement was expressly mentioned to be made *in pursuance and performance* (*i*)
of

has been admitted and acted upon in several preceding and subsequent cases, affording subject matter for its application; and if, (in the words of Mr. *Fearne*) it should be found that the distinction is in its nature ascertainable with sufficient precision, and that it has in fact prevailed through a great majority of the most important and solemn decisions, it remains to be submitted to the wisdom of our courts how far a professed adherence to the same distinction may deserve their attention, as tending to the establishment of a system or uniformity of doctrine that may keep questions of this nature within some probable limits of construction. *Fearne's Contingent Remainders*, 4th edit. p. 167 to 221. where the propriety and reasonableness of the distinction is supported with admirable perspicuity, and considerable force of argument, by that very accurate and learned author.

(g) *Streatfield v. Streatfield*, post. 176. *Hart v. Middlebury*, 3 *Atk.* 371.

(b) 3 *Bro. Parl. Cas.* 327.

(i) So *Honor v. Honor*, 1 *P. Will.* 123. 2 *Vern.* 658. *S. C.* *Partyn v. Roberts*, *Ambi. Rep.* 315. *Roberts v. Kingsley*, 1 *Ves.* 238.

The general doctrine upon this subject appears to be, that in the case of articles before marriage, containing limitations that would give the parents, or either of them, such an estate tail as would enable the father alone during the coverture, or the surviving parent afterwards, to bar the issue of the marriage under a legal settlement limiting the estate in the same words,

of the said marriage articles, whereby the intent appeared to be still the same as it was at the making the articles.

words, equity will rectify it, and make a strict settlement; unless the issue is otherwise provided for than by the limitation to the heirs, &c. or from other limitations or provisions in other lands, it appears the parties knew and intended the distinction. But that the court will not interfere, if both articles and settlement are made before marriage, unless the settlement in that can be expressed to be made *in pursuance of the articles*; for the court will suppose that the parties had altered their intention with respect to the terms of the marriage; which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such *new agreements*, and not of the articles.— But when it is said to be made *in pursuance of the articles*, all room for such a supposition is precluded.

D E

Term. Paschæ

7 Geo. II.

IN CURIA CANCELLARIÆ.

Clare versus Clare.

Case 6.
May 8.

WILLIAM Clare, possessed of a term of one thousand years, by will dated April 13, 1706. devises it to trustees, in trust for his son Thomas Clare for so many years of the term as he should live, and after his death, in trust for the issue male of his son Thomas lawfully begotten, for so many years of the said unexpired term as such issue male should live; and when the issue male of his said son Thomas should happen to be extinct, then in trust for his second son William for life; remainder in trust for the issue male of his said son William, for so many years as they should happen to live; the eldest of such issue ten, for so many years, &c. as such issue male should live; and when the issue male of T. C. should happen to be extinct, then in trust for his second son W. for life, remainder in trust for the issue male of W. for so many years as they should happen to live; the eldest to be preferred before the youngest; and after the death of W. and from the time his issue male should happen to be extinct, then the premises to descend and continue in the issue male of the name and family of the Clares, which should be next of kin, for all the residue of the term; and made his son T. C. sole executor and residuary legatee. The testator died, and T. C. died without issue male. The residue of the term shall go to the representative of T. C. contrary to the will, in which there is a plain affectation of a perpetuity.

W. Clare devises his term of one thousand years, in trust for his son T. C. for so many years of the term as he should live; and after his death in trust for the issue male of T. C. lawfully begotten,

male

(22)

male to be preferred before the youngest; and after the death of the said *William Clare*, and from the time his issue male should happen to be extinct, then that the premises should come, descend and continue in the issue male of the name and family of the *Clares* which should be next of kin, for all the residue of the term; and made his son *Thomas* sole executor and residuary legatee. The testator died, and in the year 1718, *Thomas* died without having had any issue male. The question was, Whether the whole term did not vest absolutely in *Thomas*? and whether the limitation over to *William* the second son, after failure of issue male of *Thomas*, was not void?

Mr. *Attorney General* and Mr. *Fazakerley* argued, that the limitation was good; for, that the whole being vested in the trustees, *Thomas* the first son had but a contingent interest in so many years only as should happen to be expired at his death, and no absolute estate tail in the whole; as it must have been to prevent the limitation over to *William* taking place; then it must be the remainder in the trust for the issue male of *Thomas*, which must avoid the limitation over. Indeed the word *issue* is in a will sometimes taken to be a word of limitation (though in a deed it can carry but an estate for life) in order to fulfil the testator's intent; but that intent must be plain and manifest, and the words not controlled by any other. This appears from *Wyld's case*, 6 Co. 16. where the words, *after their decease*, made the other words to be words not of limitation, but of purchase; and from the cases of *Papillon* versus *Voyce*, and *Lord Glenorchy* and *Bosville*: (k) And the reason why, in many cases, these words are determined to carry an estate tail is, because otherwise the testator's intent could never take place;

(k) *Ante* 3.

which was the reason of the resolution in *King and Melling's* case, 1 *Vent.* 214, 225. but no inference can be drawn from the case of freehold to that of leasehold estates, which have been often differenced in this court. In the case of *Peacock and Spooner*, 2 *Vent.* 195. the words were stronger than they are here; and yet the generality of them was restrained, and they were construed to be words of purchase. If then *Thomas* took but an estate for life, the remainder to his issue never taking place, must be looked upon as out of the question; which will let in the limitation to *William*: and this is an eligible construction in order to let in a provision for his family, and to follow his intent, which was, that his son *William* should take: nor is this intent controlled by any rule of law, the contingency happening within the compass of a life, viz. that of *Thomas* the elder son. And that such construction may well be made, appears from the case of *Higgins versus Dowler*, (1) 2 *Vern.* 600. and from that of *Brook and Taylor*, *Trin.* 2 *Geo.* 2. in *B. R.* where there was a bequest of a personal estate to his wife, upon condition to give his three sisters 5*l.* yearly for their lives; and after his wife's death, he gave the same to his daughter *Mary Taylor*, upon the same obligation to his sisters; and after his daughter's death, to the fruit of her body; and for want of such fruit, to his brothers and sisters and their children then living: the opinion of the court was, that the limitation to the brothers and sisters was good; and yet had there been any fruit of the body, they must have taken an estate tail; but they never coming in *esse*, the second limitation was al-

(23)

(1) *A.* demises lands for a long term in trust for *B.* for life, then to his son for the remainder of the term; and in default of issue of such son, to the second and other sons of *B.* and for want of issue male, to the daughters of *B.* for the remainder of the term. There having never been a son, the limitation to the daughters was held good.

lowed

lowed to take place. So in the case of *Stanley* and *Leigh*, (m) or *Mead* at the rolls, about three terms ago, where there was a bequest to one for life, and to his first and every other son, and there never was any son, upon the words *if he died without issue*, it was insisted, that the limitation over should take place; and that these words should be understood to be *issue at the time of his death*; and so allowed by the court: for, that the limitation to the sons, and the heirs of their bodies, never taking place, the second limitation was good, there being no danger of a perpetuity. So in our case, had *Thomas* had any issue, they would have taken an estate tail; but there being no issue of him, the limitation over to *William* the second son is good.

(24)

Mr. *Solicitor General* and Mr. *Lutwyche* argued for the plaintiff (who was executor to *Thomas* the residuary legatee) that the limitation to *William* was void; for, that it was plainly the testator's meaning, that the issue male, and the issue of that issue, should take *in infinitum*; and then he says, that when the issue shall be extinct, it shall go to *William*. The extinguishment here meant is not of any one issue, but of the whole. The words *lawfully begotten* are likewise considerable, being held by the Lord *Hale*, in *King* and *Melling's* case, to be words naturally belonging to the creation of an estate tail. — Only suppose he had made as many limitations for lives as there had been possibility of people's taking: would not this, in a court of equity, be looked upon to be the same as if he had limited it to him and the issue of his body? and has he not done it here? He has limited it to as many as should be of the name and family of the *Clares*, according to Judge *Ritchell's* invention in 1 *Inst.* 377. b. But such practices have always been discountenanced, nothing being so contrary to our laws as the admission

(m) *Stanley v. Leigh*, 2 *P. Will.* 618 to 631.

of a perpetuity. Nor will the other method, which has been attempted to support this limitation, do better; which is that of construing *Thomas* to take an estate for life, and then striking out the remainder to his issue male, as if it had never been; because there never was any issue male of him! for it is admitted, that if *Thomas* had had any issue male, this limitation over had been void; and the making it good by failure of issue male, would be making the validity of the limitation to depend upon a subsequent accident; whereas it must stand upon its own bottom, and cannot be decreed to be good or bad upon any unforeseen accident. (n) The opinion of the *Master of the Rolls*, in the case of *Stanley versus Leigh*, was founded upon the case of *Higgins versus Dowler*; (o) and there are now thoughts of appealing from that decree at the rolls. If the case of *Brooks versus Taylor* (p) had depended singly on the words *to her, and after her decease to the fruit of her body*, it had clearly been an estate tail; but the reason was, that there were those other words, *To my brothers and sisters then living*; which brought it within the compass of a life; and these words, *then living*, make the case to be the same as the *Duke of Norfolk's*, 3 *Chan. Cases*. In the case of the *Lady Laneborough versus Fox*, (q) the sessions before last, in the House of Peers, the judgment was (by the advice of all the judges present) that there was no implied estate; and consequently the recovery void; which shews that the court has never laid any stress on the accident of the death happening or not hap-

(25)

(n) *Sed vid.* Lord Mansfield's argument in *Doe v. Fothergill*, *Douglas Rep.* 509. *Hopkins v. Hopkins*, post 51. *Brownsword v. Edwards*, 2 *Ves.* 249. The result of which cases seems to be, that a devise may operate either way, according to the event.

(o) *Ante* 23.

(p) *Ante* 23.

(q) *Post* 262.

pening. And in the case of *Scattergood* versus *Hedge*, the Lord *Treby* and the other judges held that the accident of no son being born was not to influence the case one way or other; which is another strong authority that subsequent accidents are not to be regarded.

Lord Chancellor. Two questions have been made in this case; the first is, what estate *Thomas* the eldest son took by this will? whether an estate-tail, or an estate for life only? And secondly, whether, if he took but an estate for life, the subsequent accident of his dying without issue male, or rather never having had any issue male, will let in the limitation to *William* the second son? As to the first, I am of opinion, that *Thomas* took but an estate for life: nor will the subsequent words, *That from and immediately after his death the trustees should suffer, &c.* enlarge his estate for life. The word *issue* (r) in a deed can never be a word of limitation; but is made so in wills to serve the testator's intent: which was the reason of the resolution in the case of *King* and *Melling*. And if the present case was like that, I should think myself bound to observe that resolution: but that was of a freehold, which may and must descend to the issue; and *this is of a leasehold*, which, without a particular provision, can never descend; but must go in course of administration: and therefore, as here is an express estate for life limited to *Thomas*, it shall not be enlarged by any of the subsequent words; especially when in the limitation to *William* the second son, he has explained what he meant by the gift to the issue in the first part; for, there he gives it to the first and every other son, and the heirs male of their bodies: so it is plain he intended every issue that was born of

(26)

(r) In what cases used as a word of purchase, *vide* *Fearne's Contingent Remainders*, 4th edit. 163, 233, 248, 500, 553; and when as a word of limitation, 285.

Thomas should take; and then the limitation to *William*, being at so great a distance, is too remote, and cannot take effect.

The next question is, whether the subsequent accident of *Thomas* dying without issue will better the case for *William*? And as to that, I think, all deeds and wills are to stand as they did at the time of the making them, and cannot be made good by any after-act; especially where such act is collateral; and is, upon its happening, such a contingency upon which no estate can commence by law. Was it ever said in case of a limitation to one, *and if he die without issue living at the time of his death*, that you must wait till his death to determine whether the limitation be good or not? If so, that limitation would be no better than a general limitation upon a general failure of issue.

The case of *Higgins* versus *Dowler* is very imperfectly reported; and was upon a demurrer, (s) where things are not argued with that nicety which they are upon arguing the merits of a cause. That of *Stanley* and *Lee*, (t) has not been particularly mentioned; so that what we have of it is only upon memory: and I think it much better to stick to the known general rules, than to follow any one particular precedent which may be founded on reasons unknown to us: such a proceeding would confound all property. That of *Brooks* and *Taylor* (u) (whatever reason the judges might go upon) was certainly very different, by reason of the words *then living*: but there is a plain affectation of a perpetuity as strongly declared by the testator himself as can be; and a succession of estates for life to persons not in *esse*, is as much a perpetuity, and as little to be en-

(s) *Ante* 23.

(t) *Ante* 24.

(u) *Ante* 23.

(27)

dured, as would be that of an estate tail, of which no recovery could be suffered. The case of Lady *Laneborough* (w) versus *Fox* is the strongest authority that can be; and even, had it not been in the House of Lords, I should have thought myself bound to go according to the general and known rules of law.

And so decreed (x) the term to *Thomas*, as being the residuary legatee of his father; and from him to the plaintiff, who was the executor of *Thomas*.

N. B. As to this last point *Burges* and *Burges*, 1 *Mod.* 114. 1 *Chan. Ca.* 229. and *D. of Norfolk's Case*, 3 *Chan. Ca.* 19, 29.

(w) *Post* 262.

(x) *Reg. lib. A.* 1733, fol. 443.

It should seem that the authority of this case has been shaken in no inconsiderable degree, by *Sheffield v. Lord Orrery*, 3 *Atk.* 282. *Doe v. Fonnereau*, *Doug.* 470. *Marsh v. Marsh*, *Bro. Cha. Rep.* 293, which cases go the length of establishing the doctrine laid down in *Higgins v. Dowler*, 1 *P. Will.* 98. *Stanley v. Leigh*, 2 *P. Will.* 686. And also *Lloyd v. Carew Shower's Cas. in Parl.* 137. *Gower v. Grosvenor*, *Barnard* 54. *Maddox v. Haines*, 2 *P. Will.* 421. *Stephens v. Stephens*, *post.* 228. *Sabberton v. Sabberton*, *post.* 245. *Fearne's Contingent Rem.* 407. The notes to *Doe v. Fonnereau*, *Doug.* 485. 2 *Black. Com.* 174. The result of which cases, as applicable to the present, seems to be this, that the principle of preventing perpetuities did not render it necessary to hold the limitation over to *William*, to be void in its creation; for if *Thomas* had died leaving issue male, the entire interest and dominion in the term devised, would have vested in him, and nothing left upon which the subsequent limitations could attach; but as the other alternative happened, viz. that *Thomas* had no son, the limitation over to *William* operated as an executory devise, the contingency happening within the time established by law to prevent perpetuities, viz. within the compass of a life, that of *Thomas* the elder son. *Sed vid. Wyth v. Blackman*, 1 *Ves.* 202.

Knight v. Ellis 2 *Bro Cha Rep* 570

(y) *Stephens versus Hide.*

Case 7.

UPON a rehearing, the case was thus: *Humphrey Hide*, the testator, did by his will in the year 1718, devise three fourths of his personal estate to his three sons, equally to be divided between them; and as to the other fourth he devised it to his three sons, equally to be divided

between them; and the other fourth to them, in trust for his two daughters; the interest to be paid them respectively during their natural lives, and afterwards to their, or either of their child or children; and for default of such issue, to his three sons, equally to be divided between them; one of his daughters leaves a son, under whom the plaintiff claims, and the other dies without issue. The moiety of the sister who died without issue, shall not go to the three brothers, but to the representative of the nephew.

(y) In *Reg. Lib. A.* 1733, fol. 321, this case is thus stated, viz. *Humphrey Hide*, by his will bearing date the 9th of August 1718; appointed his sons *John, William, and Edward Hide*, and his daughters *Elizabeth*, (the wife of *James King*,) and *Margaret*, (then *Reynolds* who soon afterwards married the plaintiff,) executors of his will, and directed that the residue of his personal estate should be divided into four equal parts, three whereof he gave to his three sons, and directed the other fourth part thereof to be put out on good security, in the name of his said three sons, upon trust only, to and for the respective uses of his said daughters, and the interest to be paid to them respectively during their lives, and afterwards to their or either of their child or children, and for want of issue, to his said three sons equally; on the 16th May, 1719, the said testator died, and his said sons and daughters proved his will, and after payment of his debts, &c. made a dividend of the residue of his personal estate, which amounted to 3,440*l.* and one-fourth being 860*l.* was placed out by the said *John, William and Edward Hide*, at interest, in their names, and in trust for the respective uses of the said *Elizabeth King* and *Margaret Reynolds*, and their children, in manner following, viz. 600*l.* in lottery annuities, were with their consent subscribed into the South Sea Company, and the 260*l.* residue remained in the hands of the said *William, John and Edward Hide*, on their agreeing to answer interest for the same. *Elizabeth King* died without issue, and soon afterwards the said *Margaret Reynolds* died, leaving issue only the defendant *Reynolds*; the plaintiff long before the

sons, but in trust only for his two daughters, and by their approbation to be put out at interest in the name of his three sons, and the interest to be paid to his two daughters respectively *during their natural lives, and afterwards to their or either of their child or children*; and for default of such issue, he devised it to his three sons, equally to be divided between them; one of his daughters leaves a son (under

death of the said *Elizabeth King*, married with the said *Margaret*, and thereby became entitled to the whole produce of the said stock, and annuities and interest of the said 260 *l.* from the death of the said *Elizabeth King*, to the death of the said *Margaret*, when the defendant *Reynolds* became entitled to a fourth part: the defendant *Reynolds* by deed of the 8th *July* 1731, in consideration of 24 *l.* a year, sold his interest to the plaintiff. The said *John* and *Edward Hide* being dead, the said estate subject to the said trust, became vested in the said defendant *William*. *John Hide* having made his will, appointed the defendant *Mary* executrix; she insisted upon such interest as her husband was entitled to. The defendant *William Hide* insisted, that the plaintiff was not entitled to the whole dividend of the said stock and interest of the 260 *l.* but that on the said *Elizabeth King's* death, without issue, one moiety of the premises came to, and ought to be divided between him, the said defendant, and his brother *John*, in thirds, *viz.* two-thirds to him in his own right, and his brother *Edward's* right, (he being dead, and had appointed the defendant *William* his executor). The defendant *Mary* claimed no interest in the premises, and the defendant *Reynolds* by his answer, admitted the said assignment. Upon the hearing the *Master of the Rolls*, decreed that the said *Elizabeth King's* moiety of the said 260 *l.* and of the said South Sea Stock and annuities, belonged to the said testator's three sons, *she being dead without issue*, and that the defendant *Reynolds* could only take the other moiety thereof, given to the said *Margaret* his mother. From this decree, the plaintiff appealed, and upon the rehearing before the *Lord Chancellor*, his lordship declared, that the plaintiff was entitled to the 260 *l.* and the South Sea Stock and South Sea annuities, which was the produce of the lottery annuities, and to the interest and dividends thereof; the defendant *Reynolds* having assigned the same to the plaintiffs; but no costs on either side.

whom

whom the plaintiff claimed) and the other dies without issue. The question was, whether the son should take the moiety belonging to his aunt, who died without issue? or whether it should go to the three sons? The *Master of the Rolls* decreed the son to take only the moiety belonging to his mother, and the other moiety to go to the three sons of *Humphry Hide*.

Mr. *Attorney General* and Mr. *Fazakerly* argued for the plaintiff, that the children of the daughters must take by purchase; and that the devise being to the child or children of either of them, any issue of them or either of them, was entitled to the whole that was devised; that had the estate, instead of being limited to his two daughters, been limited to two strangers, there could be no doubt but that the surviving child must take the whole; and the two daughters taking only an estate for life, their child or children do not claim through or under them, and consequently it is the same as if the devise had been to two strangers, and then to the child or children of his two daughters. The testator does not say, that they shall take the motives respectively; but devises it to the child or children of either of them: so that, by the plain and necessary construction of the words, nothing could go to the sons if there was a child or children of either of the testator's daughters.

Mr. *Solicitor General*, Mr. *Lutwyche*, Mr. *Verney* and Mr. *Floyer* argued on the other hand for the defendant, that the moiety of the daughter who died without issue must go to the three sons; for, that there was no doubt but that, by the word *respectively*, the daughters were tenants in common; and the subsequent limitation, being founded on the first devise, must receive the same construction as to the children taking by purchase. This being a personal estate, the testator's intent could not otherwise be fulfilled than by making them take by

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immediate devise; but that intent was only to provide for his two daughters and their respective issues in the natural order; viz. the child or children of one to take what belonged to his or their mother, and not what belonged to the other sister: so that this case must be considered as if the testator had devised one moiety to one daughter and her issue, and the other to the other and her issue; and for want of such issue to the sons; where there can be no doubt but that, upon failure of issue of one daughter, her share must have gone over to the sons: but if the subsequent words should be explained according to the construction insisted on for the plaintiff, and that one daughter had died first, both having issue, the moiety of the deceased (whose child or children were never to take during the other's life) must go either to the surviving daughter, which is contrary to the nature of a tenancy in common; or else it must have expected, and been in abeyance until the death of the surviving sister; which is absurd; but according to our construction it will go to the issue of the person first dying, and upon failure of such issue go over to the sons, in which there is no inconvenience. And if it had happened that one daughter had had but one child, and the other several; then either the issue of each daughter must have taken their mother's share respectively according to our construction, or all the children must have taken equally *per capita*; which is contrary to the testator's intent.

Lord Chancellor. The question here is, to how much of the testator's estate the plaintiff, claiming under the son of one of the daughters, is intitled? And in this will, as well as in every other, the testator's intent is to be gathered from the words of the will, without either adding or rejecting any, which can possibly have any meaning. The testator has here devised his estate to be divided into four parts; three whereof he gives to his three sons, and
of

of those three the sons are plainly tenants in common: the fourth he has given to his two daughters; but with this difference, that whereas the sons have the property of their respective shares given them, the daughters have not the absolute property in that share which comes to them; but only the interest, which is to be paid to them respectively during their lives, and by this word *respectively* (2) they are tenants in common.

The next limitation to the children vests the whole property in them, and they take as purchasers according to *Wyld's case*, 6 Co. 16. a. but then it is contended that they must take respectively as well as their mothers: this I see no reason for, there being no words of division in the devise to them; but the whole is to go over to either of their child or children. And when a testator has used such plain words to shew his intent, that whether there was one or more children, that in either case the child or children should take the whole, I cannot add words to make the moiety only to go to his child or children, against the testator's plain intent; which appears from this; that wherever he intended a tenancy in common he has expressed it, as by the word *respectively* in case of the daughters, and the words *equally to be divided* in case of the sons. Nor is there any absurdity in supposing that if there had been many children of one sister, and none of the other, that the children should take the share of her, who left no issue in the mother's life-time; since his intent was equal, and as rational, in case there had been many children, as but one, as in the present case. But if, on the other hand, after the death of one without issue, the whole was not to go over to the children of the other till their mother's death, the surviving daughter would have an estate for life by implication; and so the absur-

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(2) *Fisher v. Wigg*, 1 P. Will. 1.

dity

dity of an abeyance or expectancy be avoided. Nor does it seem contrary to the testator's intent, that his grand-children should take *per capita*, they all being equally related to him; but as these are only cases that might have happened, I think it not necessary for me to determine how the estate would then have gone; that which has happened is only now in judgment; and upon the whole, I am of opinion that the testator's intent was, that any child of either of his daughters should (in all events) take the whole of this fourth part, and no part to go over to his sons till failure of such issue.

And so decreed for the plaintiff.

Case 8.

May 21.

Hebblethwaite versus Cartwright.

A. upon his marriage with *B.* settles his estate to the use of himself for life, remain-

JAMES Hebblethwaite, upon his marriage with *Bridget Cobb*, settled his estate to the use of himself for life, remainder to his first and other sons in tail male, remainder to trustees for one thousand years (the trust whereof is afterwards declared) remainder to his brother *Charles Hebblethwaite* for life, remainder to first and other sons in tail male, remainder to trustees for one thousand years, remainder to his brother *C.* for life, remainder to the heirs male of his body hereafter to be begotten; and then declares the trust of the term, that if there should be no issue male of the bodies of *A.* and *B.* begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of *A.* and *B.* such daughter should have 4000*l.* for her portion; and if two or more, they to have 5000*l.* equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum 100*l.* to be paid her half-yearly for her maintenance; if two or more, the like sum to be paid them half yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of the premises, or of part. Provided that if the father should in his life-time prefer them in marriage with portions equivalent, or the remainder-man should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. *B.* died in the life of *A.* leaving no son, but three daughters, who are all unmarried: *C.* took an estate tail under this settlement; and the portions may be raised for the daughters in the life-time of *A.* their father.

and

and after his decease to the heirs male of his body hereafter to be begotten; and then declares the trust of the term to be, that in case there should be no issue male of the bodies of the said *James* and *Bridget* begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be one or more daughter or daughters of the bodies of the said *James* and *Bridget*, that then the said daughter or daughters should have, if but one, the sum of 4000 *l.* for her portion; and if two or more, the sum of 5000 *l.* equally to be divided between them at their ages of twenty-one, or days of marriage, which should first happen; and that if there should be but one daughter, that then she should have the yearly sum of 100 *l.* to be paid her half-yearly by equal portions for her maintenance; and if there should be two or more, then the sum of 100 *l.* to be paid them half-yearly in equal shares, till their respective portions should be raised and paid; and in case the portions were not paid, that then the trustees, their executors, &c. should, out of the rents or profits, or by mortgage or sale of the premises, or any part thereof, during the term, raise and pay the several portions before limited, provided that if the father should in his life-time prefer them in marriage with portions equivalent to those herein limited, or that after his death the remainder-man should upon their marriage pay them portions equivalent, or that there should be no daughter or daughters who should live to attain the age of twenty one or be married, that then the term should cease and be void. *Bridget* the wife died in her husband's life-time, leaving no issue male, but only three daughters, who are all unmarried. (a)

(32)

Two questions were made: First, what estate *Charles Hebblethwaite* had? Secondly, whether upon

(a) In *Reg. Lib. A.* 1733, fol. 391. the daughters are stated to be married,

this

this trust the daughter's portions were raised in their father's life-time.

As to the first question the Lord Chancellor was clearly of opinion, that *Charles* took an estate tail: and that the words *hereafter to be begotten*, do not confine it to the issue born after, but will likewise take in that born before; the words *procreatis & procreandis* being of the same import, according to 1 *Inst.* 20; and 24 *Ed.* 3. *pl.* 15. where the limitation was *& heredibus quos ille de corpore procreaverit*, held it should take in the issue born before. And this, he said, was to prevent the great (*b*) confusion which would otherwise be in descents, by setting in the younger before the elder, &c.

The precedents in raising daughters portions have gone both ways; sometimes they have been decreed to be raised in the (*c*) parents life-time, and at other times not: which shews that the raising or not raising must depend upon the particular penning of the trust. In the case of *Brome versus Berkeley*, *Abr. Eq.*

(*b*) Vid. *Hewit v. Ireland*, 1 *P. Will.* 427. *Long v. Beaumont*, *ibid.* 231. But it has been held, that, where the words were in *posterum procreandis*, sons born before shall be excluded on account of the peculiar force of "*in posterum*," *Adj. M.* 26 *Eliz.* B. R. 3 *Leonard* 87. 1 *Inst.* 20. *Harg.* *ed. in notis* 3.

(*c*) *Greaves v. Maddison*, *Jones (Tho.) Rep.* 201. *Stanisforth v. Stanisforth*, 2 *Vern.* 460. *Bacon v. Clerk*, *Prec. in Chanc.* 500. *Gerrard v. Gerrard*, 2 *Vern.* 458. *Sandys v. Sandys*, 1 *P. Will.* 707. *Hall v. Carter*, 2 *Atk.* 355, & *Lib. Reg.* 248. *Ann.* 1742 were cases in which portions were decreed to be raised in the parents life-time. *E contra* *Corbet v. Maidwell*, 2 *Vern.* 640. *Butler v. Duncomb*, 1 *P. Will.* 448. *Pierpoint v. Lord Cheyney* *ib.* 489. *Brome v. Berkeley*, 2 *P. Will.* 485. *Evelyn v. Evelyn*, 2 *P. Will.* 659. *Stevens v. Dethick*, 3 *Atk.* 40, et *Lib. Reg.* 59. *Ann.* 1743. *Worsley v. Earl of Granville*, 2 *Ves.* 332. *Churchman v. Harvey*, *Amb. Rep.* 335.

Cq.

Ca. 340. 7. (d) the raising the portion in the mother's life-time was refused; because the provision of maintenance was not to commence until the death of the jointress, and consequently the portion could not be raised till then; for, the maintenance must precede the portion: and if that which was to precede the portion must have waited the jointress's death, it follows clearly, that the portion, which was to come after, must do so likewise. And in that of *Corbett* versus *Maidwell*, 2 *Vern.* 640. and *Eq. Ca. Abr.* 337. 5. it was requisite that the

(33)

(d) In this case a settlement was made in the usual form, with a limitation to trustees, for want of issue male, to raise portions for daughters, to be paid at twenty-one or marriage, which should first happen, by and out of the rents and profits, or by mortgage and sale, as they should think fit; and in the mean time and until the said portion should become payable, the trustees to raise 100*l.* per annum, for the maintenance of each of them: the father died, and one of the daughters having married the plaintiff, this bill was brought to have the portion raised, but was dismissed, because the portion being to be raised out of the rents and profits, or by mortgage or sale, plainly shewed that it was not to be raised till such time as the trustees might make use of the election given them by the settlement, to raise it either out of the rents and profits, or by mortgage or sale; but during the life of the mother, who had it in jointure, they could not raise it out of the rents and profits, neither by mortgage or sale, which were inserted in one and the same clause, and a discretionary power lodged in the trustees, to use either the one way or the other, and till they had the election of using either of those ways, they had no power at all, besides that, the maintenance being to precede the raising of the portions, if there was no maintenance to be raised in the mother's life-time, the portions were not to be raised in her life-time, as they were not to take place till after the maintenance; and the *Lord Chancellor* and the *Master of the Rolls* both said, that the cases on this head had gone too far already, and mangled all estates, and that they would never decree portions to be raised in the father's life time, where it could possibly bear any other construction; and the decree was confirmed in the House of Lords.

daughter should be unmarried and unprovided for at his decease; but here not only the term is not contingent, but absolutely vested in the trustees; and all the contingencies in the declaration of the trust of the term precedent to the raising the portions have happened; as that of not having issue male, the daughters marrying or attaining the age of twenty-one, &c. Indeed during the life of the father and mother, it was contingent, by reason of the uncertainty whether there would be any issue male between them: but immediately upon the mother's death it became no longer contingent, but absolutely vested, by reason of one of the parties death without issue male, which in this court is deemed a total failure of issue male between them. The case of *Greaves* versus *Maddison*, Ch. Jus. Jo. 201. was a stronger case than (e) this, and was at law; yet there the portions were adjudged to be raised in the father's life-time; though by the express words of the condition he was to be dead before the portions were to be raised: but in our case the father's death is not at all made part of the condition; it is only said, that *if there be no issue male between them, then the trustees are to raise out of the rents and profits, or by sale or mortgage of the premises, &c. without any mention made of the father's death.* Nor will the option given to the trustees of

(e) *A.* made a settlement to the use of himself for life, remainder to the use of his first son in tail male, remainder to trustees for forty years, remainder to himself in fee; the term was declared to be a trust, that in case it should happen that the said *A.* should die without issue male of his body, then the trustees should raise 5000 *l.* for daughters' portions, payable at the age of twenty one or marriage, with a provision for maintenance: in the mean time the wife died, leaving two daughters and no issue male; and it was resolved that the right to the portion was vested by the mother's death, without issue male in the life of the father; for otherwise the father might live so long that the portions might be of little service. *Greaves v. Maddison*, 2 *Jones* 201.

raising

raising either by rents and profits, or sale or mortgage of the premisses, warrant the conclusion that has been inferred, that *James Hebblethwaite's* death must necessarily precede; since it is impossible for the trustees to raise the portions out of the rents and profits during his life: for, in deeds it is usual to put in every way which may be made use of; but it does not from thence follow, that the daughters are to wait till the trustees can make their choice which way they will raise their portions: that might be making them wait till their fortunes could be of no service to them. And though the mortgage or sale is to be during the term which is not to commence in possession till the father's death, yet the portions may well be raised in his life-time; it being no where said, that the portions shall not be raised till after such time as the term shall take effect in possession. Indeed had there been no express authority given to the trustees to sell or mortgage, there might be some difficulty; but since they have the power of both, they may use that which best suits the interest of the daughters.

(34)

The next thing to be considered is the proviso, where the term is made void, in case the father should in his life-time prefer the daughters in marriage with portions equivalent with those provided for them by the settlement. The proviso has been objected to prove that the party's design was, that the portions might not be raised during the father's life, by reason of the power reserved to him of providing for them in his life-time by portions equivalent: and to prove this has been cited the case of *Corbet* versus *Maidwell*; (f) but that case widely differs

(f) The trust of the term in this case being, "that in case *Thomas Maidwell* shall die without issue male, and there shall be one or more daughters, that shall be *unmarried or unpreferred at his death*; such daughter, if but one, to have
2000*l.*

differs from the present one: for, there it was part of the description of the daughter that she should be unmarried and unprovided for at the time of the father's death; which description gave the father time to perform it during his life, for the reasons before mentioned: but we have no such description here; nor can it be thought from the nature of the thing, that a second marriage might be intended; a portion upon a second marriage being not a portion equivalent to that provided by the settlement; it could only be a first marriage that was intended; and upon that and no other were the portions to arise: not upon the distant and remote consideration of the second marriage.

And so (g) decreed the portions to be raised with interest from the mother's death, at which time they first vested.

2000 l. for her portion, and for her maintenance 30 l. *per annum*, out of the profits, till her portion become due; the portion to be paid at eighteen or more; proviso; that the term shall be void, if the said *Thomas Maidwell* pay or secure to the daughters that shall be unmarried at his death the said portion of 2000 l." And note, in this case the daughter was married, and the bill for raising the portion was brought by her husband and her.

(g) Notwithstanding the judges of later times, have, in many instances, expressed their disapprobation of the selling or mortgaging of reversionary terms for the raising of daughters portions, yet they have thought themselves bound by the rule which has been followed in many precedents, *viz.* that if there be a term for years, or other trust estate limited to trustees for raising portions for daughters, payable at a certain time, which is become a *vested* interest, they shall not stay until the death of the father and mother without their portions; unless some intention appears to postpone the raising; and if there does, the court will always take notice of such intention, and indeed will lay hold of very small grounds, that speak the intention of the party, to prevent the raising of the portions in the life-time of the father and mother.

DE
Term. S. Trinitatis

8 Geo. II.

IN CURIA CANCELLARIÆ.

(b) *Cooke versus Arnham.*

Case 9.
June 22.

UPON a rehearing, the case was thus: *Robert Cooke* seised in fee of copyhold lands in *Lakenham* in the county of *Norfolk*, and of several freehold lands, by will, dated *April 28, 1710.* devised all his messuages and lands (whether freehold or copyhold) to his grandson *Richard Cooke* (who was his heir at law) for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to his younger son the plaintiff in fee, and died without making any surrender to the use of his will; *Richard* the grandson died without issue, but before his death surrendered the copyhold lands in *Lakenham* to the use of his will; whereby he devised them to his mother and her heirs.

tail, remainder to his daughters in tail, remainder to his younger son the plaintiff in fee, and dies without surrendering to the use of his will. *C.* dies without issue, having first surrendered to the use of his will, and thereby devised the copyhold lands to his mother. The court supplied the defect of the surrender in favour of the plaintiff, although his father had made some other provision for him, and although this was only a remainder after an estate tail.

(b) In the register's book this case is stated thus: *Robert Cooke*, the plaintiff's late father, was seised in fee at the will

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of

The questions were, first, Whether the defect of the surrender should be supplied in favour of the plaintiff,

of the lord according to the custom of the manor of *Lakenham*, in the county of *Norfolk*, of several copyhold lands held of the said manor, and surrendered the same to the use of his will, and afterwards, viz. about the 28th of *April* 1710, the said *Robert Cooke* made his will, and thereby gave and devised all his messuages and lands in the city of *Norwich*, and county of *Norfolk*, whereof he was seised in fee, whether freehold or copyhold, to his grandson *Richard Cooke*, for life, and after his death, to the first, second, third, and every other son and sons of the said *Richard Cooke*, lawfully to be begotten; and to the heirs of the body and bodies of every such son and sons; with remainder to the daughter and daughters of the said *Richard Cooke*, and the heirs of their several and respective body and bodies, remainder to the plaintiff his heirs and assigns for ever, and made the plaintiff his sole executor. About *Michaelmas* 1710, the said *Robert Cooke* died without revoking his said will, and seised in fee as aforesaid, and without having made any surrender to the use of the will, and leaving the said *Richard Cooke* his grandson and heir at law. The said *Richard Cooke*, by virtue of the said will, entered on the said premises and enjoyed the same for life, and about the year 1718, died without issue, whereby all the said premises devised by the said will, and particularly the said copyhold premises descended to the plaintiff. The defendant *Arnham* got into possession of the said copyhold premises, and refused to deliver up the same to the plaintiff, pretending that the said *Robert Cooke* did not surrender the said copyhold premises to the use of his will, and that the same upon his death descended to the said *Richard Cooke* in fee, and that he before his death surrendered the said copyhold premises to the use of his will, and that he afterwards made his will, and thereby devised the same to *Susannah Cooke* his mother, and her heirs; and that the said *Susannah Cooke* afterwards devised or surrendered the said copyhold premises to the use of the defendant *Arnham* in fee. The plaintiff insisted, that if a surrender by the said *Robert Cooke* to the use of his last will is wanting, the want of such surrender ought to be aided in a court of equity in favour of the plaintiff, who is a younger son of the said *Robert Cooke*. The defendant *Arnham* insisted, that the said *Richard Cooke* and himself having been above twenty years

plaintiff, not being a child unprovided for, but already provided for another way? Secondly, Whether equity would supply the defect, it being in case of so remote a devise as a remainder upon an estate tail, which is of no (or at least very little) value in the eye of the law, and defects being never supplied where the heir is disinherited? And here the heir at law has only an estate for life, with a remainder in tail.

It had been decreed at the *Rolls* against the plaintiff, that this being no present provision intended for him, the defect should not be supplied.

Lord Chancellor. There never having been any surrender to the use of the will, the legal estate descended to the grandson as heir at law; and therefore the single question now is, Whether this court will supply that defect? The rule is, that creditors are entitled to have a defect of a surrender supplied; as are likewise younger children unprovided for; and that from the circumstances of the persons who appear in a favourable light before the court. But the objection here is, that the plaintiff does not appear in that favourable light, he being otherwise provided for. As to that it has been often

years in quiet possession of the said premises, the plaintiff ought not to set up any title to the same after such length of time, and that a surrender should not be supplied in prejudice of an heir at law and those claiming under him, though the plaintiff was a younger son, for that the plaintiff's father, in his life-time gave him 5000*l.* and at his death, by his will, gave him also 10,000*l.* more, which far exceeded the fortunes either left or descended to the said *Richard Cooke*, as heir at law to the said *Robert Cooke*; and that after the said *Richard Cooke's* death, who died without issue, the plaintiff had, as heir at law, to his father estates of 100*l.* per annum; and after the death of the said *Susannah Cooke*, the plaintiff had also, as heir to his father, other estates of inheritance, of the yearly value of 90*l.* and that there was no want of assets to pay his debts. *Reg. lib. 1733. fol. 480.*

held here, that the father is the sole and only judge of the *quantum* of the provision; and the defect of surrenders has been supplied even where the copyhold estate, intended to pass, has made but part of the provision; and so not liable to the objection of leaving the child intirely unprovided for, in case the defect was not supplied: for the court has never yet entered into the consideration of the *quantum* that was proper for each child. And I do not find it insisted on by the counsel, that had the provision been in the same will, and not by any other act in the testator's life-time, that that would have taken away any equity he might have to get the defect supplied: and if it would not in that case, why should it in this?

- (37) The objection is, that this could not be intended as a present provision, being a remainder after several estates tail; which being so remote, is of little or no value in the eye of the law. But this objection is of no weight: for, suppose the father had but a remainder upon an estate for life; might not he have made a provision out of it for his children?—It is true, he could not make so good a provision as where he is in actual possession; but it would be a provision still. And if after one life, why not after three or four? And what difference is there between the cases where the court will supply a defect of a surrender upon a remainder depending on an estate for life, and where the whole is devised away, or is only a remainder after an estate tail? That is, why should it be supplied where the whole is devised away from the heir at law, and not where but part? Here is no intermediate disposal of the estate but to such persons as would have all been intitled to take as heir at law before the plaintiff: so his intent was, that for so long as his heirs at law continued, such as would be so before the plaintiff, that this should be a provision for him; and when they fail, there is no heir at law to be disinherited, but he becomes heir at law himself. Nor can it be said, that

that there is an heir at law unprovided for: for, though he is made but tenant for life, yet there are limitations to all his issue, who are all to take before the plaintiff.

And so reversed the decree, and ordered the defect of the surrender to be supplied. (i)

The case of *Burton* versus *Lloyd*, in Lord Harcourt's time, said to be in point. (k)

(i) At the plaintiff's charge; but directed the account of rents and profits only from the time of *filing the bill*, *Lib. R. ante 3 P. Will.* 288. S. C. 2 *Eq. Cas. Abr.* 235. S. C.

(k) It appears by the register's book, that in this case the bill was brought (inter al') to supply the deficiency of a surrender left in the hands of a customary tenant, and not presented at the next court. The uses of the surrender were to the testator's eldest son *Andrew Burton*, and the heirs male of his body; and for want of such issue, to the plaintiff, the second son, and the heirs male of his body, remainder over. The cause was heard before his Honor, 3d July, 1712, who decreed for the plaintiff; and on the 14th November, 1713, that decree was, on an appeal, affirmed by Lord Chancellor. *Vid. 3 P. Will.* 285.

DE
Term. S. Michaelis

8 Geo. II.

In CURIA CANCELLARIÆ.

Bosanquett versus Dashwood. (1)

Case 10.
11 Nov.

This court will decree money overpaid in pursuance of an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments.

THE plaintiffs being assignees under a commission of bankruptcy against the two *Cottons*, brought their bill against *Dashwood* the defendant, as

(1) In Reg. lib. A. 1734. fol. 105. this case is thus stated, viz. *Samuel Cotton* and *John Cotton* (afterwards bankrupts) borrowed several considerable sums of money from the testator *Sir F. Dashwood*, for securing whereof, with interest, they gave him several bonds and notes under their hands; and about *December 1710*, accounts being settled between them, and all interest on the said bonds and notes paid, 10,000*l.* remained due to the said testator, which was secured by several bonds; and the said testator soon after demanding immediate payment of the money due on the said bonds, and the bankrupts being unable to pay the same, the testator insisted that for the future they should pay him interest at the rate of 10*l. per annum* for every 100*l.* of the said 10,000*l.* and sign an agreement for that purpose; and if they would not pay such interest, threatened to put the said bond in suit: whereupon the said bankrupts signed an agreement in writing to pay such interest; and pursuant thereto, from 1710 to 1714, inclusive; paid the said testator 1000*l.* a-year for the interest of the said 10,000*l.* besides the same interest for 1500*l.* borrowed of him on the

11th

as executor of Sir *Francis Dashwood*, who had in his life-time lent several sums to the *Cottons* the bankrupts,

11th *April*, 1711, on their promissory note, and for 1000*l.* borrowed of him on the 11th *December*, 1711, on their promissory note: that the said bankrupt, about the year 1715, paid the said testator 500*l.* in part of a bond debt, and soon after borrowed 500*l.* upon a bond and promissory note, dated the 11th *May* 1716, whereby they became indebted to him in 10,000*l.* for which they paid interest to him at the rate aforesaid, from that time to 1724. The said bankrupts, in *July* 24. paid the said testator 2000*l.* in discharge of one of their bonds, and since his death paid the defendants, his executors, the further sum of 3000*l.* in discharge of other of the said bonds; and it appeared by the schedule annexed to the plaintiff's bill, which contained an account of all the money borrowed of the said testator, and of the payments made in discharge thereof, that nothing remained due on the said bonds, and the plaintiffs insisted the same were considerably overpaid. The defendants admitted they had found a note or memorandum, dated the 10th of *January*, 1709, whereby the bankrupts agreed that what sums of money should remain due from them on bonds from *Lady-day* 1710, should be paid as soon as might be, and to allow interest after the rate of 10*l.* a-year for every 100*l.* till the whole should be paid; and that the bankrupts, about *July* 1724, paid the testator 2000*l.* in part of the 10,000*l.* which they then owed him; and since his death they had paid the defendants, his executors, the further sum of 3000*l.* in further part of the principal money owing to his estate; and said, that since the testator's death there were found among his effects, besides a bond from the bankrupts to the testator, (which had been delivered up) five bonds, all executed by the said bankrupts to the testator, and believed the bankrupts were indebted to the testator at his death in 8000*l.* principal and interest for the same, at the rate of 6*l.* for every 100*l.* from *Lady-day* 1724. and after his death, and before their bankruptcy at several times, paid the defendants the said 3000*l.* part of the said principal, and 1350*l.* on account of interest at 6*l.* per cent. for every 100*l.* And in *June* 1728, the said defendants made up an account of what was received on account of the said 8000*l.* and interest after the said testator's death, computing the interest only to *Lady-day* 1709. and on the balance of such accounts 5000*l.* ap-

rupts, upon bonds bearing 6*l. per cent.* interest; (*m*) and had taken advantage of their necessitous circumstances, and compelled them to pay at the rate of 10*l. per cent.* to which they submitted, and entered into other agreements for that purpose; and so continued paying 10*l. per cent.* from the year 1710. to the year 1724.

It was decreed at the *Rolls* that the defendant should account; and that for what had been really lent, legal interest should be computed and allowed; and what had been paid over and above legal interest, should be deducted out of the principal at the time paid; and the plaintiffs to pay what should be due on the account: and if the testator had received more than was due with legal interest, that was to be refunded by the defendant, and the bonds to be delivered up.

Mr. *Solicitor General* and Mr. *Fazakerley* insisted for the defendant, that it was hard to inquire into a transaction of so long standing, the parties having on all sides submitted to the agreement; and that *volenti non fit injuria*; which was the reason of the Lord *Holt's* opinion in the case of *Tomkins versus Barnet*, (*n*) 1 *Salk.* 22. why an action would not lie for

peared due for principal, and 705*l.* for interest; and such account being then delivered to the bankrupts, they acknowledged such balance was justly due, and promised to pay the same; and the said defendants, the executors, insisted that if the said bankrupts paid their testator any greater interest for the money they owed him, than after the rate of 6*l. per annum* for every 100*l.* the same being actually paid by the bankrupts themselves, the plaintiffs could not revoke such payments, which were voluntarily made, and admitted assets of their testator, sufficient to answer plaintiff's demands. *Reg. lib.* 1734. fol. 105.

(*m*) Being the then legal interest.

(*n*) Lord *Mansfield* expresses his suspicions of the accuracy of this case, as reported by *Salkeld* in the following words,

for recovery of money paid upon an usurious contract; and that the bankrupts being *participes criminis*, should have no more advantage here than at law. Nothing was more common than to admit the party, after he had paid the money, to be an evidence in an information upon the statute of usury; which shews he is, in the eye of the law, after payment, an indifferent person: and compared it to the case of gaming; where, if the loser pays the money, and does not sue for the recovery within the time prescribed by the act, (o) he is barred. And cited the

words. viz. "As to the case of *Tomkins v. Barnet*, it has often been mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange argument, that it is difficult to make any thing of it. One book says, it was determined by Lord *Holt*; another, by Lord *Treby*. Certain it is, it was only a *nisi prius* case. I think the judgment may have been right, but the reporter, (*Salkeld*) not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid in part of principal and legal interest, upon an usurious contract; and therefore the action would not lie: for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and therefore the man who, from mere necessity, pays more than the other can in justice demand, and who is called in some books the *slave of the lender*, shall be said to have paid it willingly, and have no right to recover it back, and the lender shall retain, though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take." *Dougl. Rep.* 697. in notes.

(o) By stat. 9 *Anne*, c. 14, sec. 2. the loser may recover the money lost, within three months after the loss. If he does not sue for and recover it within that time, any person may recover the sum lost, and treble the value. But it has been

the case of *Walker versus Penry*, (p) 2 Vern. 78, 145.

Lord Chancellor. There is no doubt of the bonds and contracts therein being good : but it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters which have been read, and which prove an agreement to pay 10*l.* *per cent.* and that from Sir *Francis Dashwood's* receipts ; but whether the plaintiffs be intitled to any relief in equity, the money being paid, and those payments agreed to be continued, by several letters from the *Cottons* to Sir *Francis Dashwood*, wherein are promises to pay off the residue, is now the question ?

been held that the limitation of three months is confined to the case of money actually paid at the time ; but that if a bond or other security is given, and the money, or part of it, afterwards paid, a court of equity will compel the re-payment of that money to the loser, after the expiration of three months. *Rawden v. Shadwell*, *Ambl.* 269.

The reason there stated to have been given by Lord *Hardwicke*, is, that the security being void by 9 *Anne*, c. 14. the payment under such security cannot be supported. But, *qu.* because the contract also is not made void. By 16 *Car.* 2. c. 7. sec. 3. if the loss at one sitting is more than 100*l.* the contract itself is made void ; and in *Rawden v. Shadwell*, the bond was for 500*l.*

(p) In this case, upon a re-hearing, the only question insisted on was, Whether a mortgagee having received interest upon an old mortgage after the rate of 8*l.* *per cent.* after such time as the interest was reduced to 6*l.* *per cent.* by the statute, should allow or discount the 2*l.* *per cent.* towards satisfaction of the principal. The court confirmed the former decree, *viz.* that the 8*l.* *per cent.* paid to the mortgagee for interest, should be retained by him as such ; and that the 2*l.* *per cent.* should not be discounted, nor applied towards satisfaction of the principal.

The

The only case that has been cited, that seems to come up to this, is that of *Tomkins* versus (q) *Barnet*; which proves only, that where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And tho' a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them.

(40)

The penalties, for instance, given by this act, are not to be sued for here; nor could this court decree them. And though no *indebitatus assumpsit* (r) will lie,

(q) *Supra.* Vide also *Jacques* and *Golightly*, 2 *Blackst.* 1073. in which this case is denied to be law.

(r) *Sed vid.* *Smith* and *Bromley*, cited in *Jones v. Barkley*, *Dougl.* 696. where, in the words of Lord *Mansfield*, the following rule is laid down, viz. "If the act itself is immoral, or a violation of the general laws of public policy, there the party paying shall not have his action (*indebitatus assumpsit*); for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, and deceit; and if such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." *Vid. also*, *S. P. Cockshot v. Bennet*, *B. R. M.* 29 *Geo. 3.* 2 *Term Rep.* 763, 766. *Jacques v. Withy*, *C. B. T.* 28 *Geo. 3.* *H. Bl.* 65. *Nerot v. Wallace*, *B. R.* 29 *Geo. 3.* 3 *Term Rep.* 17. *Astley v. Reynolds*, 2 *Str.* 915. where the plaintiff having pawned some goods with the defendant for 20 *l.* he refused to deliver them up, unless the plaintiff would pay him 10 *l.* The plaintiff had tendered 4 *l.* which was more than the legal interest amounted to; but finding that he could not otherwise get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered. *Vid. also* *S. P. Fitzroy v. Gwillim*, *B. R. E.* 26 *Geo. 1* *Term Rep.* 53. the result of which cases, upon principle, and by analogy, seems to be, that a plaintiff may recover

lie, in strictness of law, for recovering of money paid upon an usurious contract; yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The case of *Sir Thomas Meers*, heard by the Lord *Harcourt*, is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this: *Sir Thomas Meers* had in some mortgages inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest: upon a bill filed, the Lord *Chancellor* relieved the mortgagors against this covenant, as unjust and oppressive. So likewise is the case of *Broadway*, (s) which was first heard at the *Rolls*, and then affirmed by the Lord *King*, an express authority, that in matters within the jurisdiction of this court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is; because all those cases carry somewhat of fraud with them. I do not mean such a fraud as is properly deceit; but such proceedings as lay a particular burden or hardship upon any man: it being the business of this court to relieve against all offences against the law of nature and reason: and if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law (as in this case) against the statute of usury, though the party may have submitted for a time to the terms imposed on him? —

recover upon this action all money paid by him beyond legal interest, upon an usurious contract or loan. *Vid.* also *Bellon v. Hyde and Mechell*, 1 *Atk.* 126 to 128. *Scott v. Nesbit*, 2 *Bro. Cha. Rep.* 641. *Ex parte Skip.* 2 *Ves.* 489.

(s) *Broadways v. Morecroft*, *Mosely* 247. 2 *Salk.* 449. *Comyns's Rep.* 349, 351.

Heathcote v. Paignon 2 *Bro Cha rep* 170 The.
 & note in same case 176

The payment of the money will not alter the case in a court of equity; for, it ought not to have been paid: and the maxims of *volenti non fit injuria*, will hold as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered: it is that only which the *statute* has in view; and it is that only which intitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel, of the bankrupts being *participes criminis*; for, they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship which he labours under, and which is imposed on him by another, that makes the crime. The case of gamesters, to which this has been compared, is no way parallel; for, there both parties are criminal: and if two persons will sit down, and endeavour to ruin one another, and one pays the money, if after payment he cannot recover it at law, I do not see that a court of equity has any thing to do but to stand *neuter*; there being in that case no oppression upon one party, as there is in this. Another difficulty was made as to the refunding: but is not that a common direction in all cases where securities are sought to be redeemed, that if the party has been over paid, he shall refund? (t) Must he keep money that he has no right to, merely because he got it into his hands?—I do not determine how it would be, if all the securities were delivered up; this is not now before me: I only determine what is now before the court; and is the common direction in all cases where securities are sought to be redeemed.

In the case of money lost at gaming and paid, possibly this court will refuse relief; the plaintiff in equity being *particeps criminis*.

And so affirmed the decree, &c.

(t) *Moore v. Batten*, Ambl. Rep. 371.

Cafe 11.
12 Nov.

Penne versus Peacock & uxor.

Husband and wife levy a fine of her trust estate; this shall bind the wife, unless there be proof of force or fraud: and this, altho' she by answer had sworn that she was compelled by *dureſs* to join.

THE defendant *Jane Peacock*, before her marriage, conveyed (with her now husband's privacy) the premisses to trustees, in trust to pay the rents and profits to her sole and separate use for her life; and after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint; and for want of such appointment, then to her own right heirs for ever. She afterwards marries the defendant, who mortgages part of the lands to the plaintiff for 1000*l.* for a term of five hundred years; and then a fine is levied by husband and wife, who both declared the uses of the fine, as to the mortgaged premisses, to be to the plaintiff for securing the principal and interest. — The wife, by order of the court, answered separately; and insisted in her answer, that she had been forced to join in the fine by *dureſs*, insinuating the mortgage to be fictitious, and in trust for the husband, in order to defraud her. She further insisted, that there was no power reserved to her in the indenture of bargain and sale, to dispose of her real estate, or any part thereof, but by her last will; that she had no estate in the premisses, but that the fine and mortgage were both void.

It was insisted for the defendant, that the legal estate being in the trustees, the parties to the fine had not such an estate in them whereof a fine could be levied to bar the wife's right; and that this being a mere naked power, without any interest, could not be barred by the fine, but remained still in the wife by force of the first conveyance.

Lord Chancellor. The suggestions of *dureſs* and fraud in the defendant's answer, do not appear upon the proofs; although it must be confessed, that the reserving the equity of redemption to the husband and his heirs, without any mention made of the

wife, looks a little suspicious: but as the fraud is not made out to the satisfaction of the court, it is needless to determine how far so solemn an act as a fine might be affected by it. The next objection is, that the legal estate being in the trustees, the husband and wife had not such an estate in the land whereof a fine could be levied to bar the wife's right: but as to that, it is very well known, that the operations of fines and recoveries is the same upon trust estates as upon legal estates. And if so, it must inevitably follow, that an estate for life limited to the wife, and the remainder limited to her own right heirs in default of any appointment made by her last will, are both disposed of by the fine. And if no such remainder had been limited by it, as the estate was the wife's own, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred. This answers the objection of its being a naked power, or power in gross, and so not barred by the fine: for, how can that be called a naked power, which is to operate and take effect on the party's own estate? It is certainly a power coupled with an interest, and annexed to her inheritance, and so destroyed by the fine; since that a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate: so a feoffment to the use of her last will, or the surrender of a copyhold to the use of one's last will, do still leave a power in the feoffor or surrenderor to dispose of their estate by a new feoffment or surrender.

(43)

And so decreed (*u*) the trustees to convey to the plaintiffs the mortgagees, but without prejudice to any future bill that might be brought for discovery of the fraud or force.

For the defendant was cited the case of *Blackwood* versus *Norris*, heard some-time ago at the

(*u*) *Reg. lib. A. 1734. fol. 42.*

Rolls, where the Lady *Shovell* had devised 4000*l.* in trust for the separate use of a feme covert; and upon a bill brought by husband and wife against the trustees, though the wife was herself in court, and consented that the money should be paid to her husband; yet the *Master of the Rolls* would not decree it, but dismissed the bill.

N. B. This was the case only of a personalty. (w)

(44)
Case 12.
10 Nov.

A construction in favor of executory devises, to support the intent of the testator, will be made either in the courts of law or equity, if it may be done consistently with the rules of law.

Hopkins versus Hopkins.

THE testator Mr. *Hopkins*, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for *Samuel Hopkins* (the plaintiff's only son; which plaintiff is heir at law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said *Samuel*, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said *John Hopkins*, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their respective lives; with the like remainders to their several sons; with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said *Samuel Hopkins*; and for want of such issue, in trust for the first and every other son of the body of *Sarah*, the said *John Hopkins*'s eldest daughter, lawfully to be begotten; with like remainders to the sons of *John Hopkins*'s other daughters; and for want of such issue, then in trust for the first and every other son of his cousin *Anne Dare* (wife of *Francis Dare*) lawfully to be begotten; with like

(w) See *Vin. Abr.* 4 vol. 202. S. C.

remainders to the heirs male of the body of every such son of the said *Anne Dare*; and for default of such issue, then in trust for his own right heirs for ever: then come two provisoes; the one, whereby every person that should come into possession of his estate, was to take his name, and bear his arms: the other is in these words; *Provided also, and it is my will, that none of the persons, to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof, than as hereinafter is mentioned, until he or they shall have respectively attained his or their ages of twenty-one years; and in the mean time, and until his or their attaining to such age, my trustees and their heirs and executors shall make such allowances thereout, for the handsome and liberal maintenance and education of such person and persons respectively, as they shall think suitable and agreeable to his estate and fortune; and it is my will, that the overplus of the said rents and profits, over and above the annual allowances, or such part thereof as shall remain after all my debts, legacies, and funeral expences shall be first paid, (with the payment whereof I have charged my real estate, in case my personal estate shall not be sufficient for those purposes) do go to such persons as shall first be intitled unto, or come into the actual possession of my said real estate, according to this my will.*

Whatever interest in, or profits out of a real estate, are undisposed of by a testator, descend to the heir: and he takes them, not by the will, or the intent of the testator; but they are thrown upon him by the law, for want of some other person to take. *Æquitas sequitur legem.*

Samuel Hopkins died in the testator's life-time, without issue; and some time after, the testator died without any alteration made of his will: nor had *John Hopkins* any other son; nor were any of the other remainder-men in esse at the testator's (q) death, except — *Dare*, son of *Ann Dare*.

(45)

The

(q) Which circumstance after the testator's death, occasioned the bringing two bills, one by *John Hopkins* and his daughter,

The first question was, Whether by *Samuel's* death in the testator's life-time, the several limitations between him and *Dare* were not become void; there being no particular estate to support them as remainders, by reason of *Samuel's* death in the testator's life-time, who was to take the first estate; nor nobody capable of taking at the testator's death but the son of *Anne Dare*, who thereby claimed the whole interest presently? or whether these intermediate limitations should not enure by way of executory devise to any other son he might hereafter have?

The second question was, in case the limitation to the other sons of *John Hopkins* was to be looked upon as an executory devise, What should become of the rents and profits in the mean time?

The cause was first heard at the *Rolls*, and there decreed to be an executory devise. (r)

(46)

Mr. *Serjeant Eyre*, and Mr. *Peere Williams* argued, that the consideration of trust and legal estates being the same, this limitation to the other sons of *John Hopkins* was to be taken to be a remainder, and could not enure; the rule of law being never to construe that an executory devise, which may enure

daughter, to have an account and an execution of the trust; and *John Hopkins* prayed, that as heir at law he might have the profits till some persons came *in esse*, capable to take under the will, as part of the trust undisposed of; the other bill was brought by the trustees, that till a person was *in esse*, capable of taking, the profits might be accumulated to increase the estate. 1 *Atk.* 582. S. C.

(r) The *Master of the Rolls* being of opinion, that the limitation to *Samuel Hopkins* was to be considered as if it had never been in the will, and therefore that the devise to after-born sons being by future words, in case his cousin *John Hopkins* should have any other son, it was now to be considered as the first devise, and might take effect as an executory devise. *Vid.* 1 *Atk.* 682. S. C.

as a contingent remainder. They agreed the difference between deeds and wills; that in the former the first estate must be good, otherwise all the remainders depending thereon are void, and can never arise; but in the latter, the first estate may be void, and yet the remainders take place, as in 2 *Ro. Ab.* 415. *pl.* 6, 7. *Plow.* 414. *a. Cro. El.* 423. 2 *Vern.* 722. But they insisted, that devises of real estates were to relate to the time of the making the will; as if one devises all the land he has, or shall have at his decease, yet no after-purchased land shall pass, but such only as he had at the time of the will made; and that what was a limitation by way of remainder at the time of the will made, could not, by any (s) subsequent accident, become an executory devise, 1 *Salk.* 237. 1 *Sid.* 3. 2 *Ro. Abr.* 418, 2 *Saund.* 380, 388. 1 *Salk.* 226. and that this, being to arise after an estate tail, was too remote; the law not allowing of executory devises to arise after an estate tail.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, Mr. *Fazakerley*, Mr. *Bootle*, and Mr. *Strange*, argued on the other hand, that *Samuel* being dead without issue in the testator's life-time, this limitation to the other sons of *John Hopkins* should enure by way of executory devise. They observed, that executory devises were not of a very long standing; yet that they are of the same nature with another thing which is very ancient; which is springing uses, which are as old as uses themselves. And that, if at common law such things were allowed, it was very well done of the judges to admit of executory devises to carry into execution, as far as possible, the intent of the testator. That the testator's

(s) Sed vid. *Brownfword v. Edwards*, 2 *Ves.* 249. *Doe v. Fonnereau*, *Dougl. Rep.* 487 to 509. in which cases it was held and determined that a devise may operate either way, according to the event.

intent is clear in this case, that the first and every other son of *John Hopkins* should take; and that this intent may be carried into execution is likewise clear. Indeed, as a contingent remainder, it can never take effect; because remainders must take place *eo instanti* the particular estates determine; but in order to prevent that inconveniency, other ways have been found out to support wills; and the Lord *Hobart* commends the judges for being *astuti* to serve the party's intent. The rule laid down on the other side, that a limitation which may enure as a remainder, shall never be construed to be an executory devise, is true: but that is only a supposal that the party's intent was, that things should go according to the ordinary forms; but where they cannot, there extraordinary methods are used to serve the intent; and it is impossible to find out any set of words more proper to make an executory devise than those used here: nothing but the intervening estate to *Samuel* can make any difficulty; and that is answered by the cases put on the other side, 2 *Ro. Abr.* 41. b. of a devise to *A.* for life, remainder to *B.* and of a devise to a monk, remainder over; *A.* dies in the testator's life-time; *B.* shall take by way of executory devise; and in the latter case, immediately upon the testator's death, the remainder-man shall take: and yet if either *A.* had outlived the testator, or the monk been deraigned in the testator's life-time, in both cases the second limitation must have been a remainder. So in this case, the estate to *Samuel* never having taken effect, it must enure by way of executory devise, to the first and every other son of *John Hopkins*; whereas had *Samuel* outlived the testator, the limitation had been a remainder. — The case in 1 *Sid.* 3. widely differs from this; for, that was upon a settlement, which is complete upon the execution of it; whereas a will is ambulatory until death. Nor can any better comparison be drawn between this and the other cases that have been put, which are of contingent remainders, and so quite foreign to executory devises. And in that
of

of *Purefoy versus Rogers*, 2 *Saund.* 380, 388. the particular estate was existing after the testator's death; which consequently supported the remainder; and so plainly differs from this case, where is no particular estate in being. But *Cro. Eliz.* 878, (t) is a strong authority for the construction now desired; for, there the devise was of lands to J. S. from *Michaelmas* following, remainder over in fee; the testator died before *Michaelmas*; it was held by the court, to be a good executory devise: for, a remainder it could not be; because it could not begin until the particular estate did, which was not to commence till *Michaelmas* after; and a freehold cannot be in expectancy: it was therefore held, that the freehold should, in the mean time, descend to the heir at law, and vest in him; but if in that case the testator had lived to *Michaelmas*, then it had been a good remainder. And if an executory devise may, by a subsequent accident, become good as such, especially where the testator's intent is clear that it should; (which was the reason of the resolution in the case of *Higgins versus Dowler*, (u) 2 *Vern.* 600,

(48)

(t) One seised in fee devised lands to J. S. for five years from *Michaelmas* then next, remainder to B. in fee, and the question was, whether this was a good devise of the remainder in fee to B. and adjudged that this was a good devise of the remainder in fee; for though it was admitted that a freehold could not expect or be in abeyance, yet in that case the freehold and fee-simple descended and vested in the heir at law till *Michaelmas*, and so was not in abeyance, and this made the devise after *Michaelmas* good. *Cro. Eliz.* 878.—*Pay's case*. In 1 *Lut.* 79. or *Clarke v. Smith*, this case is mentioned by the court, and admitted to be law: A. seised of land in fee, devises to B. in fee, to commence and take effect six months after the testator's death, this is plainly a good executory devise, and will take effect at the end of six months after the testator's death; but it is expressly held there, that during those six months the estate descends and continues in the heir at law of the testator.

(u) *Ante.*

where

where the limitation to the daughter was allowed to be good, there being no son to take: so a devise to two and their heirs, one dies in the life of the testator, the survivor shall take the whole, 1 *Salk.* 238.) and if courts of law do, much more will courts of equity mould the words so as to let in those whom the testator intended to take. Nor will the objection hold that has been made on the other side, *viz.* that this, being to take effect after an estate tail, is too remote, and can never arise; for, here can never be any estate tail before this executory devise is to arise, *Samuel* being dead without issue: nor is there any danger of a perpetuity; the longest time that this can subsist as an executory devise being only until the birth of a son to a person in *esse*, which is but nine months: whereas in the case of *Floyd* versus *Carey*, in the House of Lords, twelve months were allowed to be a reasonable time; and in that of *Massenburgh* versus *Ash*, (w) 1 *Vern.* 234, 257, 304. twenty-one years were held to be good; and where there is no danger of a perpetuity, it is just that executory devises should be carried as far as may be

(w) Which case was this: A term for years was assigned to trustees in trust for baron and feme during their lives, and the life of the longer liver of them; and if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then in trust, that the eldest son of that marriage should be maintained out of the rents and profits, until he attained his age of 21 years, and then the whole term to be assigned unto him; and in case he should die before the age of twenty-one years, then in like manner for the maintenance of the second, third, fourth, and every other son of that marriage, in the same manner; but if no such son, or if all the sons die before twenty-one, then to J. S. Baron and feme die, and leave a son only, who dies whilst an infant of about five years old—and the question was, whether the remainder over to J. S. was good? and held that it was.

to serve the intent of the party. This court went a great way in that case of *Massenburgh* versus *Asb.*— And though the courts at law would not at first allow any executory devise to arise after the compass of a life or lives wearing out together, as appears by the case of *Scattergood* versus *Edge*, (x) 1 *Salk.* 229. yet that of *Floyd* versus *Carey*, being subsequent to that, and in the House of Lords, has led the courts of law into carrying them as far as this court does.— The case of *Lord Glenorchy* versus *Bosville* (y) is another strong authority; where the words were determined to carry an estate tail; but the trusts being executory, and the intent of the parties clearly otherwise, they were restrained, and decreed to carry but an estate for life, with remainder to the first and other sons, &c.

(49)

Lord Chancellor. Two questions have been made upon this will: the first is, Whether this limitation to the first and every other son of *John Hopkins* can now take effect as an executory devise? or, whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of *Samuel's* death in the testator's life-time, and that *John Hopkins* had no son in esse at the testator's death, in whom the remainder might vest? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until *John Hopkins* has a son? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of *Samuel's*

(x) 1 *Eq. Caf. Abr.* 189. pl. 14, 15. S. C.

(y) *Ante* 3.

estate,

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estate, which would have supported it: so is the case of *Purefoy versus Rogers* (z) 2 Saund. 380. 388. and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So on the other hand, it is likewise clear, that had there been no such limitation to *Samuel* and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to enure as a remainder: so that it must be the intervening accident of *Samuel's* death in the testator's life-time, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void; because the time of making is principally to be considered; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a re-publication: which was the case of *Bunter versus Cook*, 1 Salk. 237. because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former; though these subsequent accidents may and must, in many cases, have an operation upon the will; as in the case of *Fuller versus Fuller*, (a) Cro.

(z) Vid. also Fearn's *Contingent Remainders*, on Executory Devises, 242, 261, 262, 280, 299. 3 ed. also 4 ed. 451.

(a) Devise to *A.* and the heirs of his body, remainder to *B.* *A.* dies in the life-time of the testator; held that *B.* should take presently, although *A.* left issue.

Eliz. 422. and *Hutton and Simpson*, 2 *Vern.* 722. (b) And in the lord *Landsdown's* case, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, *for want of such issue*, were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case *John Hopkins* has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of *John Hopkins* should take, is quite destroyed; there being no precedent estate to support it as a remainder.—The very being of executory devises shews a strong inclination, both in the courts of law and equity, to support the testator's intent (c) as far as possible:—and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In *Pay's* case, *Cro. Eliz.* 378. (d) had the testator lived to *Michaelmas*, the limitation had been a remainder; and if a re-

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(b) Devise of land to *A.* in tail, and after *A.'s* death without issue to *B.* *A.* dies in the life-time of the testator, leaving issue, the devise to *A.* held to be void, and that *B.* should take presently, though against the express words of the will, and the intent of the testator.

(c) Vide *Doe v. Fonnereau*, *Douglas* 470, and authorities there cited.

(d) *Vid.* also *Noy* 43 S. C. but differently stated, *et ante* 48.

mainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before *Michaelmas*, what would otherwise have been a remainder, was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to *John Hopkins*? And this must depend upon the wording of the proviso. The words are, *That none of the persons to whom the estates are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one; and that in the mean time the trustees shall make such allowance thereout as they shall think suitable; and then he wills, that the overplus of such rents and profits do go to such persons as shall be intitled unto, and come to the actual possession of his estate, &c.* By which words none are affected but such as are to come to the estate under the limitations. It restrains them from having any thing to do with the estate till they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them; but here is no provision made what shall become of those rents and profits until a son be born. The words *in the mean time* have been differently construed: and it was said, that there was no certain *terminus a quo*, from whence they should begin. Had *Samuel* lived, the *terminus* must have been from the time of the limitation taking place; and so it must be *toties quoties* any come to be intitled to this estate under the several limitations: but until somebody is in *esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend

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descend upon the heir at law; (e) the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir at law. So it was held by the Lord King in the case of Lord and Lady *Hertford* versus Lord *Weymouth*; which shews that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to *John Hopkins* his heir at law, can never be supposed to have intended him this surplus. And to warrant that objection, the case of *North* and *Crompton*, 1 *Chan. Ca.* 196. has been cited. I answer, that in these cases the heir does not take, by reason of the testator's intent being one way or the other; but the law throws it upon him: and wherever the testator has not disposed (be his intent that the heir should take or not take) yet still he shall take: for, somebody must take; and none being appointed by the testator, the law throws it upon the heir.

And so affirmed the decree, (f) and ordered the personal estate (which was of very great value) to be laid

(e) *Carrick v. Errington*, 2 *P. Will.* 361. *Bullock v. Stones*, 2 *Ves* 521. *Harris v. Barnes*, 4 *Burr.* 2160.

(f) And directed the trustees to deliver possession to the plaintiff *John Hopkins*, (of particular estates) and of the estate purchased by the testator after the making the will, and to deliver the deeds and writings to him; and declared he was entitled to the rents and profits devised to the trustees, accrued since the testator's death, till some person should be in being, entitled to an estate for life in possession according to the limitation in the will, and was entitled to the surplus produce of the testator's estate, after payment of the annual sum charged thereon; and directed an account of both the real and personal estate, and a like direction as

laid out in land, and settled to the same uses as the real estate, according to the direction of the will. (g)

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Case 13.

Lutkins versus Leigh.

20 Novemb.

A. devises
(as touching
his worldly
estate, after
payment of
his debts
which he

BENJAMIN Knight having mortgaged his freehold lands to *Mr. Ainscomb* for securing the sum of 2500*l.* in 1729, made his will in these words; *As touching my worldly estate, after payment of*

wills to be first paid) his lands (inmortgage) to *B.* his wife for life, and after her death to *C.* and directs the residue of his personal estate to be placed out at interest; *B.* to have the interest during her life, and after her death to *C.* and gives *B.* 1500*l.* provided she accept the devises and bequests in lieu of dower; there is not sufficient personal estate to pay the debts and legacies; if the mortgagee take part of the personal estate, the legatee shall, for so much, stand in his place.

as to the personal estate for investing it in lands; there was no direction given concerning a conveyance of the estate, but a general preservation, and liberty to apply to the court, as there should be occasion." 1 *Atk.* 582. S. C.

(g) Soon after the affirmance of this decree, *John Hopkins* had issue *William Hopkins*, a second son, who soon after dying without issue, *John*, the eldest son of *Hannah Dare*, having attained twenty-one, brought his bill to have a settlement made to him by the trustees, either in tail or for life, as the court should think him entitled, and for also an account of the profits during *William's* life-time, and that the surplus profit may be paid to him, and upon the hearing it was argued for him, that the estate vested in *William* (the second son of *John Hopkins*) on his birth, and was no longer executory, and consequently all the subsequent limitations became remainders, either contingent or vested, according to their respective natures; and that those that were contingent not vesting, either during or *eo instanti*, that the particular estate of *William* determined, were void, and consequently the plaintiff *John Dare*, as having the first remainder vested in him, was entitled to the estate in possession.

For

of my debts and funeral charges, which I will to be first paid, I give my freehold estate in Kent to my wife for life, chargeable with an annuity of 30l. for life to Elizabeth Knight; and after his wife's death he devises his said freehold estate, so charged, to the children of his three sisters, and directs the residue of his personal estate to be placed out at interest; his wife to have the interest during her life, and after her death to be divided among the children of his three sisters; and gave his wife 1500l. with a proviso that the devises and bequests in the will should be accepted by the wife in lieu of her dower, and in full satisfaction of her share of the personal estate.

For the defendant it was argued, 1st. That there is no necessity to consider the limitations subsequent to that to the second son of *John Hopkins*, as contingent remainders, but that they may subsist as so many distinct executory devises, and if one did not take effect another might; 2d, (and which was most relied on) that admitting, that by the estates vesting in *William*, the subsequent limitations were to be looked upon as remainders, yet such as were contingent, were not destroyed by their not vesting during his life, but that the legal estate in the trustees is sufficient to support them; 3d, That a determinable freehold in the equitable estate descended on the heir at law, and that is sufficient to suppose the contingent remainders of the trust estate. And decreed by Lord *Hardwicke*, chancellor, (7th March 1738) that though by the vesting of the estate in *William Hopkins* the second son, the subsequent limitations were to be considered as turned into contingent remainders, yet that they are not destroyed by not becoming vested in the life-time of *William Hopkins*, but that the limitation of the fee of the legal estate to the trustees is sufficient to support them, and the bill was dismissed; but the chancellor said he would be understood to mean such of the remainders only as could be supported by the rules of law, and not the remote ones to the sons unborn of sons unborn, for that possibilities upon possibilities the law will not admit of. Vid. *Atk.* 581, S. C. 1 *Ves.* 269, S. C.

The

The question was, whether the personal estate should be applied in exoneration of the real, (b) so as to defeat the pecuniary legatees; there not being sufficient to pay the 1500^l. in case the personal estate should be applied in exoneration of the real.
Mr.

(b) The personal estate of a testator is the primary fund for the payment of all his *personal* debts, or general legacies. 2 *Eq. Cas. Abr.* 369 c. 4. *Eyre v. Hastings*, 2 *Cha. Rep.* 273. *Gower v. Mead*, *Prec. in Chanc.* 3. *Mead v. Hide*, 2 *Vern.* 120. *Cutler v. Coxeter*, *ibid.* 202. but this rule is to be understood with some exceptions; for if there be an express clause to exempt the personal estate from payment of debts, there the load lies upon the heir, because it is the will of him who has the dominion over both estates, that the real estate should be charged in such manner. *Wainwright v. Bendiows*, *Prec. in Chanc.* 451. 2 *Vern.* 718. S. C. *Hall v. Brookes*, *Gilb. Eq. Rep.* 72. 1 *Eq. Cas. Abr.* 12, 271, S. C. *Bamfield v. Wyndham*, *Prec. in Chanc.* 101. *Heath v. Heath*, 2 *P. Will.* 366. *Stapleton v. Colville*, *post.* 202. *Walker v. Jackson*, 2 *Atk.* 264. *Duke of Ancafter*, v. *Mayer*, 1 *Bro. Ch. Rep.* 456. But in order to exonerate the personal estate from payment of debts and legacies, it is necessary not merely to charge the real, but the will must exempt the personal. *French v. Chichester*, 2 *Vern.* 568. *Samwell v. Wake*, 1 *Bro. Chan. Rep.* 145. *Duke of Ancafter* v. *Mayer*, *sup.* in which last case all the authorities which apply either in affirmance or denial of the doctrine upon this subject are thoroughly considered; but where the intention to exonerate the personal estate is *beyond all doubt*, such intention shall prevail, though no express words are used for that purpose, *Webb v. Jones*, 2 *Bro. Cha. Rep.* 60. So the personal estate shall not be liable in case of the real, to the defeating of any legacy, *Tipping v. Tipping*, 1 *P. Will.* 730. *Oneal v. Mead*, *id.* 694. So where the real estate is from the nature of the contract primarily liable, *Countess of Coventry v. Earl of Coventry*, 2 *P. Will.* 222. *Freeman v. Edwards*, *id.* 437. *Evelyn v. Evelyn*, *id.* 664. So the personal estate shall not be applied where the debt (though personal in its creation) was originally the debt of another. *Cope v. Cope*, 2 *Salk.* 449. *Bagot v. Oughton*, 1 *P. Will.* 347. *Lawson v. Hudson*, *Bro. Cha. Rep.* 58. *Tweddel v. Tweddel*, 2 *Bro. Cha. Rep.* 101. The Earl of

Mr. *Attorney General* insisted for the widow, that this legacy was to be looked upon as a charge upon the real estate, according to the Lord *Warrington's* case; and said, It was a great while before this court would favour the devisee of land (being but *hæres factus*) so far as to intitle him to have the personal estate applied in exoneration of the real. (i) 1 *Chan. Ca.* 271. and 2 *Vern.* 477. where it is said, That an express devise shall (k) not be defeated, even for an heir, much less for a devisee of land, who is but *hæres factus*.

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Lord Chancellor. This point has been so far determined, that it seems quite settled and clear; where a man leaves his real estate charged, the legatees and simple (l) contract creditors have a right

of *Tankerville v. Fawcett*, 2 *Bro. Cha. Rep.* 57. But where the charge on the real is merely collateral, and auxiliary to the personal estate; the latter shall be first applied so far as it will go, and the deficiency only made up out of the real. *Howell v. Price*, 1 *P. Will.* 294. *Bartholomew v. May*, 1 *Atk.* 487. *Gatton v. Hancock*, 2 *Atk.* 424. *Marchioness of Tweedale v. Earl of Coventry*, *Bro. Cha. Rep.* 240. In *Evelyn v. Evelyn*, *sup.* the reader will find all the general reasoning upon this subject.

(i) *Cornish v. Mead*, of this case Lord *Hardwicke* says, it is the last in which the court refused to apply the personal estate, in favour of an *hæres factus*; and though this case was determined in Lord *Nottingham's* time; Lord *Hardwicke* expresses his opinion that it must have been determined by the *Master of the Rolls*, or some judge sitting for him, because Lord *Nottingham* had determined the contrary expressly in a case prior, which was the first case where an *hæres factus* had this determined in his favour, viz. that personal assets should be applied in exoneration; but this was the case of an *hæres factus* of the whole estate. *Galton v. Hancock*. 2 *Atk.* 437.

(k) *Hawes v. Warner*.

(l) Vid. the principal cases upon this subject collected by Mr. *Cox*, in his note upon *Clifton v. Burt*, 1 *P. Will.* 679, 680. and arranged by him with his usual accuracy and judgment.

Where the
personal
estate shall be
applied in
exoneration
of the real.

The case of
heir factus
not quite so
favourable
as that of an
heir at law.

(55)

to stand in the room of bond creditors, if these latter run away with the personal estate; and this in order to do justice both to the testator's intent, and likewise to the creditors. Indeed where the contest is between the heir and executor, and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied; but that is only where no prejudice is done either to a simple contract creditor or legatee: and had there been no devise of the land in this case, the widow and the other legatees would have had a right to apply to this court, and to stand in the room of the mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate, as he had out of the personal: but here the real estate is devised away; which gives the legatees rather a stronger claim than when they have to do with an heir at law; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir at law; though at last he has prevailed where there is no damage done to a third person: but it has been endeavoured here to put him in a better condition than the heir; and to that end has been cited 1 *Salk.* 416. There is a great difference between that case and this; for, a bond affects not the real estate in the testator's hands; nor did it the devisee, until the statute of fraudulent devises; nor, before that statute, did it affect the (*m*) heir, if he had aliened before the writ brought: but in case of a mortgage, that is a lien upon the land both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus the court has gone as far as is reasonable, viz. to put the *heir factus* in as good

(*m*) 3 & 4 *Will. & M.* c. 14.

a plight as the *hæres natus*; but not in a better. (n) So the legatees must have the legacies out of the personal estate in case the mortgagee keeps to the real; and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payment.

Sabbarton versus Sabbarton.

Case 14.

JOSEPH *Sabbarton* being seised of a real estate, 22 Novemb. and possessed of a personal estate in bank stock and orphans stock, by will dated *April 21, 1710.* devised his real estate and stock to trustees, and their heirs, executors, &c. in trust to pay the rents and profits to *Catherine Corr* for life; and if she married *Benjamin Sabbarton*, then in trust, after her decease to pay the rents and profits to him for life; and after both their deaths, in trust to the first and every other son of them two in tail male; and for want of such issue, to their daughters, equally to be divided between them; and for want of such issue, then in trust for the issue male or female of the survivor of them, equally to be divided between them; and in default of issue of the said marriage, then in trust for the issue of the survivor of them; and if neither of them leave issue, then in trust for his sister *Sarah Kidwell* for life, and after her decease, to the use

(n) In the old cases this diversity is found to have been held between *hæres factus*, and a devisee of particular lands, viz. that a devisee of particular lands should not have the benefit of the personal estate, but that the *hæres factus* of the whole should; but in the case of *Pockley v. Pockley*, 1 *Vern.* 36. it was said by Lord *Nottingham*, that not only he, who is *hæres factus*, shall pray in aid of the personal estate to discharge thereby, but even an ordinary devisee shall have that benefit; and Lord *Hardwicke*, in *Galton v. Hancocke*, 2 *Atk.* 436. observed, that Lord *Nottingham's* opinion had been followed ever since.

(56)

of all and every the child and children of his brother *John Sabbarton*, which shall be living at his death, or his wife shall be *ensient* of, and shall attain the age of twenty-one, and to the heirs, executors, administrators and assigns of such child or children, share and share alike, as they shall respectively attain their ages of twenty-one; and in default of such children, &c. then to his own right heirs. *Benjamin* and *Catherine* intermarried, but had no issue between them: *Catherine* survived, but had no issue, and devised to the defendant. The question was between the plaintiff, who was child to *John Sabbarton*, and the defendant, who claimed under the devise of *Catherine*. Whether the limitation of the personal estate to *Benjamin* and *Catherine*, and the issue of the survivor of them, did not create an estate tail in *Catherine*, who survived, and consequently the limitation over, of a personalty after an estate tail void.

Mr. *Solicitor General* for the plaintiff cited the case of *Atkinson* and *Hutchinson*, heard the second of May last, where the (o) devise was to trustees, in trust for his wife, so long as she should remain unmarried; then in trust for such child and children as he should leave at his death, equally to be divided between them; and if either of them die without issue, then his share to go to the survivor; and if both die without issue, then in trust for the defendant *Hutchinson*; he left two daughters, who both died without issue, under age; and there the words *dying without issue* were held to be *issue living at the death*, and so the limitation to *Hutchinson* allowed to be good. So in the case of *Donne* versus *Merrefield*, heard at the *Rolls* the 22d of October 1730. where the devise was, to his brother *John* for life; then to such person as he should marry, for her jointure; and after her death, to the heirs of the body of his

(o) Before Lord *Talbot*, 3 P. Will. 259.

brother *John*, and the executors, administrators and assigns of such heirs during the residue of the term; and for default of such issue of his brother *John*, then to *Henry Donne*: This limitation to *Henry* was held good; the words being taken to be heirs living at his death. *Forth (p) versus Chapman* heard by the Lord *Macclesfield*. *Higgins versus Dowler*, 2 *Vern.* 600.

Lord Chancellor. I do not see how it is possible to maintain this limitation to the children of *John Sabbarton*. Executory devises are favoured in order to support the parties intent; but still they must not exceed the rules. The compass of a life is held to be a reasonable time for a contingency to happen in: So in the case of *Massenburgh versus Ash*, 1 *Vern.* 234, 257, 304. Twenty-one years after a life were held to be a reasonable time; but a contingency to arise after the determination of an estate tail, is too remote: so that the question must be here, Whether the words mean a general failure of issue, or such a failure as is to happen within the compass of a life? The real and personal estates are both devised to the same trustees; and the limitations are the same. The estates are first limited to *Benjamin* and *Catherine* for their lives, remainder to their first and other sons, remainder to the daughters; and for want of such issue, then in trust for the issue male or female of the survivor; which latter words do clearly make an estate tail, according to *King and Melling's case*, 1 *Vent.* 214, 225. they taking in both sons and daughters, and grandchildren *in infinitum*.

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It has been endeavoured to confine this limitation to *the issue living at the death of the survivor*; but it can never be imagined that these limitations to *John Sabbarton's* children were intended to take

(p) 1 *P. Will.* 663.

effect before the determination of the former; and they plainly carry an estate tail; these latter must be void. It has been also objected, That the words *leave issue* must be construed *issue living at the death*; but still we must remember, that this is a complicated devise both of the real and personal estate; and in case of the real, this limitation to the issue of the survivor makes *Benjamin* and *Catherine* tenants in tail; and the personal estate being intended to go, and be limited in the same manner as the real, must likewise be an estate tail; and so the limitations of it after that void; the word *leave* being only to connect the clauses, and shew what is to become of the estate after the determination of the former limitation. The words in the case of *Forth* and *Chapman* (q) were different, and carried an intent in the testator

(q) That case being this; one *Walter Gore*, by will devises thus; all his estate real and personal he gave to *J. Chapman* in trust, only the lease of the ground he held of the school of *Bangor*, for the use of his nephew; *William Gore* and *Walter Gore*, during the term of the lease as hereafter limited, and having given several legacies, declared his will as to the remainder of the estate, as well as his freehold house in *Shaw's Court*, with all the rest of his goods and chattels whatsoever and wheresoever he gave to his nephew *William Gore*; and if either of his nephews *William* or *Walter* should depart this life, and leave no issue of their respective bodies, then he gave the said (leasehold) premises to the daughter of his brother *William Gore*, and the children of his sister *Sibley Price*; upon which the question arose, whether the limitation over of the leasehold premises to the children of the devisors brother and sister, was void as too remote.

The *Master of the Rolls* (Sir *Jos. Jekyll*) was of opinion, and decreed, that the devise over was void; but on an appeal, the *Lord Chancellor Parker* held it good, for that there can be no difference between the words *without leaving issue* (which is construed to mean issue at his death) and *leaving no issue*; but what made it infinitely stronger, was, that the fact happened to be, that the testator had a real and leasehold estate, and devised all his estate, as well freehold, as goods

testator different from the intent in this case. In that of *Atkinson* versus *Hutchinson* there was no precedent limitation in tail, as there is here. And in the other of *Donne* versus *Merrefield*, the contingency of the brother's having issue was to arise within the compass of a life; and there were no words carrying a general failure of issue, by reason of the words *executors, administrators and assigns*, which restrained the word *heirs* to immediate heirs: and that contingency never happening, the limitation over was allowed to be good.

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And so dismissed the plaintiff's bill, &c.

See this case stated more at large, with the opinion of the judges of the King's Bench, &c. towards the latter end of this book. Post. 245.

The Lord Raymond's Case.

Case 14.

UPON a petition to the Lord Chantellor, the defendants set forth, That the late Lord Raymond had by his will appointed them guardians to the present Lord, his only child, and trustees of his estate till he should come to age; that the plaintiff was but seventeen years old, and was seduced by Mr. Chetwynd in order to marry his daughter Mrs. Mary Chetwynd, who was much inferior to him in family and fortune; that it would be a great disadvantage to the plaintiff to marry at this time, by reason of his tender age and want of education; that the plaintiff had contracted such an acquaintance with the lady, that the defendants had been

This court will assist the testamentary guardian to prevent an improper marriage of the infant heir.

goods and chattels to *A.* and if *A.* died leaving no issue, then to *B.* and then the same words in the same will were construed to make the several devises good, and to give the first devisee an estate tail in the freehold, and but an estate during his life in the leasehold. *Atkinson v. Hutchinson*, *sup.*

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forced to keep him close in their custody for some time to prevent their marrying; wherefore they (in general terms) prayed the assistance of this court; and that his lordship would give such directions as to him should seem proper.

The petition was supported by an affidavit, setting forth Mr. *Chetwynd's* proceedings. And there was also an affidavit of Mr. *Chetwynd*, shewing that he did not give the plaintiff any encouragement; but that upon solicitation, and after he had been twice with the defendants about it, he had consented to the intended marriage.

(59) *Lord Chancellor.* It appears that the Lord *Raymond* is but seventeen years old, and is about contracting matrimony at an age when he is not capable of judging for himself; and unfortunate for him it is that he is of age to contract matrimony; it being most reasonable to have the guardian's counsel in all such cases; especially where they are appointed by the will (s) of the father, and have the same power over the infant as the father would have had: but here has been an application in time; and I am glad it has before the marriage was actually consummated; since it is most proper for the court to prevent it, if it be in its power so to do. There are many cases where application has been made to this

(s) By statute 12 Car. 2. c. 24. a father has a right to dispose of the guardianship of his child, until he attains twenty-one years of age; and the right of a testamentary guardian takes place of a guardianship by nature; for by the express words of the act of parliament, the guardian by will takes place of all other guardians, and his authority by that law is a continuation of that parental authority. Vid. *Harg. Co. Litt.* 886, notes 11, 12, 13, 14, 15, 16, where the substance of the cases respecting the several kinds of guardianship, and the origin and extent of the jurisdiction of the court of chancery, in the superintendence of guardians, is considered at large.

court after the marriage had ; and such have always been attended with a censure upon the parties privy to, and promoting such marriage, without the consent of the court. In the Earl of *Shaftsbury's* case, (1) *Eq. Ca.* 172. there was an order of court before the marriage had ; and so the infant Lord was more immediately under the care of the court ; and upon his mother's consenting to his marrying, and promoting it without the consent of the court or the guardian, a sequestration went against her ; although the marriage was with the Lady *Susanna Noel*, a lady of equal family, and every way proper for my Lord *Shaftsbury*. In the case of Mrs. *Hand*, (u) daughter to Dr. *Hand*, all the parties were committed ; it being held a contempt of the court to marry a ward of the court without its direction. Indeed this is not the present case : but I infer from hence, that we are to take all the care we can to prevent this marriage. As to the inequality of fortune, it is not shewn what estate the plaintiff, the Lord *Raymond*, has : so that I cannot tell whether this be a *Smithfield* bargain or not. And as to the family, it is admitted that Mr. *Cbetwynd* is of a very good family. But the age of the Lord *Raymond* is improper ; and that is the consideration which weighs most with me, and upon which I think myself bound in duty to prevent the marriage if I can. In order therefore to strengthen the guardians hands, I order that the Lord *Raymond* shall continue in their care and custody ; and that they do not permit him to marry without the consent of the court. As to Mr. *Cbetwynd*, the match not having taken effect, there is no necessity of looking so minutely into the affair in order to censure him. He would have done well not to have consented to this marriage, unless the guardians had done so too. But it has been said, That it would be cruel and unnatural in a father not

(60)

(1) 2 *P. Will.* 112. S. C.

(u) S. C. cited in 2 *P. Will.* 113.

to suffer his daughter to marry to her advantage; and she would have reason to blame him for it ever after. Now to prevent that charge upon Mr. *Chetwynd*, I order him not to suffer his daughter to marry the Lord *Raymond* without the consent of the court; (w) which prevents any imputation or charge upon Mr. *Chetwynd* from the lady or any body else; since, if there be any fault in it, it will fall upon the court; and I shall be very willing to bear it.

N. B. In this case there was no cause in court at the time the facts set forth in the petition were transacted. The bill was filed but the day before the petition was presented: and in the cases cited, there were causes in court at the time of the marriages.

(w) *Smith v. Smith*, 3 *Atk.* 305. which was a petition preferred by Mrs. *Smith*, on behalf of her daughter Miss *Smith*, devisee of a very large estate, under her father's will, against Mr. *Barry*, fourth son of Lord *Barrymore*, that the court might restrain him from marrying her daughter, being an infant, and a ward of the court, or to make such other order as the court should think fit; when Lord *Hardwicke* (after noticing the superintendence exercised by this court over infants) ordered, that as Mr. *Barry* was likewise an infant, his guardian should not permit him to marry the young lady without the leave of the court.

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8 Geo. II.

In CURIA CANCELLARIÆ.

Cotterell versus Purchase.

Case 15.

THE plaintiff and her sister being seised of an estate in *Yorkshire* as jointenants, the plaintiff by lease and release, in consideration of 104 *l.* conveys the moiety to the defendant and his heirs: but it was admitted, that the conveyance (though absolute in law) was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Sometime after, in the year 1708. those deeds were cancelled; and in consideration of a farther sum, which made up the whole 184 *l.* she conveys the estate in manner as before, but with this farther covenant, That she would not agree to any division or partition of the estate, or make, or cause to be made, any division or partition thereof, without the licence, consent, advice and appointment of him the said *Benjamin Purchase*. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710. when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed it quietly till 1726. at which time the plaintiff filed her bill to be let into redemption; to which the

A mortgage will not easily be presumed against an absolute conveyance; especially where possession has gone along with the conveyance, and an acquiescence for many years: altho' there be an incongruous covenant in the deed. A defeazance contained in a separate deed, is suspicious, and ought to be discouraged.

(62)

defendant pleaded himself an absolute purchaser for a valuable consideration; and in 1732. the cause coming to be heard upon the merits, the *Master of the Rolls* was of opinion, that the deeds of 1708. amounted to an absolute conveyance; and dismissed the bill.

For the defendant were given in evidence several particulars, to shew, that by the deeds of 1708. the parties intended an absolute conveyance of this estate. And it was insisted, that as the deeds were an absolute conveyance in law; by the statute of frauds no trust or mortgage could be implied without an agreement in writing. And they insisted likewise, that as the defendant had been in possession ever since the year 1710. the plaintiff was barred of the redemption by the statute of limitations.

It was said on the other hand for the plaintiff, That the defendant's plea admitted the first conveyance made in consideration of the 104 $\frac{1}{2}$. to be intended but as a mortgage; and that the second conveyance was in the same form, excepting the covenant; and that it was therefore probably intended in the same manner. That as to the covenant, it made strongly for the plaintiff; since to suppose a person would absolutely sell away his estate, and then covenant not to make a division of it, is absurd. That the statute of frauds makes nothing against the plaintiff; this being in nature of a resulting trust, and so within the proviso in that statute. Nor can the statute of limitations affect the plaintiff; since in cases of redemptions the court always gives what it thinks a reasonable time. And though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances; (x) yet that rule cannot affect the plaintiff, who did
not

(x) As the statute of limitations, has, in the cases of lands, after twenty years possession, barred the plaintiff of his entry

not lose possession till 1710. and brought her bill in 1726.

Lord Chancellor. The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case: for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance; so that it is of no great weight, and must be laid out of the question. Then as to the circumstances; on one side has been shewed an account stated of money received; and it is there said *so much received on account of purchase money*; and in another general account the sum of 184*l.* is called *purchase money*. Then as to the agreement in 1710. that if the plaintiff had a desire for it, she should have her estate again upon (y) payment of the money with interest, and the costs he had been at: this shews it was not redeemable at first. There have been strong proofs on both sides as to the value: one has shewn the rent to be but 27*l. per ann.* and then deducting one third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be 40*l. per ann.* But I ra-

(63

entry or ejectment, so a court of equity in imitation of that law, will not allow a mortgagor to redeem a mortgage, after the mortgagee has been twenty years in possession; and the same length of time will bar a redemption in equity, as will bar an entry at law. *Ord v. Smith*, 2 *Eq. Cas. Abr.* 800. pl. 27. *Floyer v. Lavington*, 1 *P. Will.* 269. *Jenner v. Tracey*, and *Belch v. Harvey*, 3 *P. Will.* 287, note (13) *Mellor v. Lees*, 2 *Atk.* 494. 3 *Atk.* 313. *Anon.* ✕

(y) *Barrell v. Sabine*, 1 *Vern.* 268.

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+ *Baker v. Wind* 1 *Ves* 161

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ther give credit to the first; because it is certain the dower was but 9*l.* *per ann.* So that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified: for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud; (2) and no length of time will bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant; yet it is not like making an entry and then lying still: (64) for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it; but I think it a wrong way; and, to me, it will always appear with a face of fraud: for, the defeazance may be lost; and then an absolute conveyance is set up. I would discourage the practice as much as possible.

Upon the circumstances of the case, affirmed the decree, &c.

Case 16.

Jones versus Marsh.

A settlement made after marriage, for valuable consideration, for advancement of the issue, may be considered as a purchase, and defeat a subsequent purchaser; and the value paid is not to be too strictly examined; there being room for bounty.

THE defendant's father, sometime after marriage, in consideration of an additional portion of 100*l.* paid by his wife's mother (a receipt

(2) *Bacon's Tracts*, 37.

whereof

whereof was indorsed on the deed) settles an estate of 100*l. per ann.* upon himself for life, remainder to his first and other sons, &c. and the mother of the defendant's father, having an interest in this estate, joins with him in the conveyance; the father, thirteen years after, mortgages this estate, with the usual covenants to the plaintiff, and dies; the plaintiff brings his bill to foreclose. The question was, Whether the settlement should be looked upon as a volunteer and fraudulent against a creditor, who lent his money so many years after.

The case of *Parflow* versus *Weedon*, *Eq. Ca. Abr.* 149. was cited; but the *Lord Chancellor* said that Mr. *Vernon* had always grumbled at the determination of that case, and never forgave it the *Lord Macclesfield*; saying it was contrary to the constant practice of the court. There were also cited the cases of *Osbourne* versus *Strode*, and *Duranda* versus *Cooke*, in the late *Lord Chancellor's* time. (a)

Lord Chancellor. The question is, Whether this be a voluntary conveyance or not? Here is plain proof that 100*l.* was paid, the receipt being indorsed upon the back of the deed, for a consideration for 100*l. per ann.* yet, in marriage settlements, things are not to be considered so strictly, there being room for bounty: and every man ought to provide for his wife and family. Besides, in this case there was an estate that moved from the defendant's father's mother; and she may, in some respect, be considered as a purchaser of the limitations made to her grandchildren: so that it would be very hard to call this a fraudulent settlement; since it is in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations; which cannot be called voluntary (65)

(a) *Lord Chancellor King.*

against a creditor who lent his money thirteen years after.

How far this court will set aside a family settlement without any consideration, as fraudulent against a creditor who lends his money thirteen years after the settlement, I do not say. I need not at present determine that point. (b)

Case 17.

14 February.

Collet versus De Gols and Ward.

A bankrupt whose estate is in mortgage, conveys the equity of redemption to a third person after an act of bankruptcy, but before the commission and assignment; this shall not defeat the assignees. But where a *bona fide* purchaser for a valuable consideration, and without notice, has a contest with the assignees, this court will not take any advantage from him, therefore not compel a discovery. A commission issued is notice of the bankruptcy.

THE plaintiff, as assignee under a commission of bankruptcy against *Tyssen*, filed his bill against *Ward* and others, to set aside several conveyances, which *Ward*, and the other defendants in trust for him, had obtained of *Tyssen* after his bankruptcy, and also without any consideration. The defendant *Ward* pleaded himself a purchaser for a valuable consideration of all the estates in question; and also that he had no notice of *Tyssen's* being a trader or of his having committed any act of bankruptcy. Whereupon an issue was directed; and the jury found *Tyssen* a bankrupt, and fixed the day of the bankruptcy to the 25th of December 1732. *Tyssen* being seised of a considerable real and personal estate, some part of which real estate was in mortgage to *Bradley* for 1000*l.* and another part to *Harkshaw* for 500*l.* which latter mortgage, and some

(b) *Ward v. Shallet*, 2 *Ves.* 18. *Hylton v. Biscoe*, *ibid.* 305 to 309. *Prec in Chanc.* 101 anon. *White v. Thornborough*, *ibid.* 426. 2 *Vern.* 702. S. C. *Kirk v. Clark*, 276. *Stileman v. Ashdown*, 2 *Atk.* 478, *Russell et al. v. Hammond*, 1 *Atk.* 14. *Lord Townshend v. Windham*, 2 *Ves.* 11. *Stephens v. Olive*, 2 *Bro. Cha. Rep.* 90. Vide also *Hungerford v. Earl*, 2 *Vern.* 261. *Shaw v. Lady Standish*, *ibid.* 327. *Bacon's Tracts* 310. *Beaumont v. Thorpe*, 1 *Ves.* 27.

Fitzger v. Fitzger 2 *Atk.* 511

others,

others, were by assignments vested in the defendant *Ward*; and great part of *Tyssen's* personal estate being conveyed in trust for *Ward*, subsequent to *Tyssen's* bankruptcy, *Ward* got several mortgages, and also releases of equity of redemption of all the aforesaid estates; which he now insisted upon against the plaintiffs, and the creditors under the commission.

It was argued for the plaintiff, that all things done by *Tyssen* subsequent to his bankruptcy, were as so many void acts; and that *Ward* could have no advantage from them. The act of bankruptcy was, in itself, of such force as to put *Tyssen*, from that very time, under an incapacity of disposing of, or affecting any of his real or personal estate to the prejudice of his creditors under the commission; that the legal effect of the assignment avoided all intermediate acts between the bankruptcy and the assignment; so as to give the whole to the assignees, according to the case of *Kidwell* versus *Player*, (c)

(c) Which case was this:—Assignees of commissioners of bankrupt brought trover on their own possession, *ut de bonis suis propriis*; and that they came into the hands of the defendant, and he converted them. And, upon evidence, it appeared the conversion was by executing a *fiere facias* on the goods in the declaration, after the bankruptcy, and before the assignment, and it was not proved that the plaintiffs had demanded them; and this being made a case, it was agreed, that by assignment the assignee had a property, by relation, from the very time of the bankruptcy, and there was no mesne interval of time, as where one takes out letters of administration, he has a property from the death of the intestate, and may declare generally *ut de bonis propriis*, even before administration sued out. But *Holt* denied this, and said, he ought to declare specially, and so the plaintiff might have done in the principal case, and he relied upon the case of *Perry v. Bowyer*, and said the assignee was in by relation from the time of bankruptcy, so as to avoid all mesne acts, but not so as to be actually invested with the property. *Adjournatur.*

N. B. In *Salkeld* this case is called *Kiggill v. Player*.

1 *Salk.* 111. and the case of *Phillips versus Thomson*, 3 *Lev.* 191. where an act of bankruptcy was committed after a *fi. fa.* delivered to the sheriff, and before seizure of the goods by him; and held that the execution was of no effect against the assignees; and the law is the same with regard to the bankrupt's disability over his real estate, by the statute 13 *Eliz.* cap. 7. and 21 *James* 1. cap. 19. the plaintiff there would be intitled to avoid an execution by *elegit*, if the act of bankruptcy was committed before the *liberate*, and the plaintiff would in such case be accountable for the profits intermediate to the bankruptcy and the assignment. It was farther argued, that by the stat. 13 *Eliz.* a purchaser would be defeated although there should be forty years after an act of bankruptcy and before a commission; and although the purchaser had no notice; for, the words of the statute are general *after bankruptcy*; and the *proviso* in the end of the statute makes it still plainer, *viz. that assurances made by a bankrupt before bankruptcy, and bona fide, shall not be defeated.* This was hard doctrine against fair purchasers without notice; but so the law was. And there is therefore a proviso in the end of 21 *Ja.* 1. *that no purchaser, for a good and valuable consideration, shall be impeached, unless the commission be sued out within five years after the bankruptcy:* and here the commission was sued out within three years. Wherefore they insisted that the incumbrance should be redeemed; and that the plaintiff should have the residue of the real and personal estate; and that *Ward* should not come in as a creditor for any money lent after the bankruptcy.

It was also farther urged, that the equity of the redemption of the mortgaged premises was an interest transferred by the statute to the plaintiff; and that the defendant's having no notice of the bankruptcy when he lent his money would therefore make no alteration. Besides, all the conveyances after the 25th of *December*, 1722, are fraudulent for want of a
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consideration; and therefore *Ward* had not the usual equity of a purchaser for a valuable consideration without notice; and then as he had not paid a consideration, his not knowing of the bankruptcy will not avail him. It appears likewise that he had notice of *Tyssen's* absconding, and being often denied to his creditors: and though *Ward* might be ignorant of the legal consequence, yet *ignorantia juris non excusat*, according to the case of *Hitchcock* versus *Sedgwick*, 2 *Vern.* 156.

On the other hand, it was insisted for the defendant, that as he had the law on his side, and equal equity at least with the plaintiff, if not a superior one, in regard he paid a valuable consideration for all the deeds after *Tyssen's* bankruptcy, and besides had no notice of it, that the court (*d*) would not interpose to his prejudice: and the case of *Hitchcock* and *Sedgwick*, 2 *Vern.* 156. was cited, to shew how far purchasers without notice were favoured in courts of equity: as also 2 *Chan. Cas.* 72, (*e*) 135, (*f*) 136, (68) (*g*) 156. (*b*) 1 *Vern.* 27. (*i*) 2 *Vern.* 599. (*k*)

N. B. There was no proof of a valuable consideration; but only some few scattering sums which *Ward* let *Tyssen* have at different times.

(*d*) *Walker v. Bodington*, 2 *Vern.* 599.

(*e*) *Perrat v. Ballard*.

(*f*) *Anon.*

(*g*) *Brown v. Williams*.

(*h*) *Wagstaff v. Read*.

(*i*) *Abery & Jones v. Williams*.

(*k*) *Walker v. Bodington. sup.* *

These were all cases in which the court declared that equity will not compel a defendant to discover what goods he really bought of a bankrupt after the bankruptcy and before the commission sued out, where the party has no notice of the bankruptcy.

* *Ryal v. Rawley* 1 Ves 348 Lord
Ex parte Gulston 10th 193
Worsley v. Demattos 1 Burr 467

Lord Chancellor. The first consideration will be as to that part of the estate which is in mortgage to *Bradley*: and the question is as to that, Whether the plaintiffs, the assignees of *Tyssen*, are to redeem it, or the defendant *Ward*?

The release of the equity of redemption, which *Ward* has obtained, appears to be a gross imposition: for, the consideration is mentioned to be 2000*l.* yet not a farthing appears to be paid. The statutes that have been mentioned concerning bankruptcy, bind equitable as well as legal rights, and courts of equity as well as law. These statutes were founded on supposed frauds of the bankrupts; and therefore intended to put them under disabilities to prejudice and defraud their creditors. In the present case, the equity of redemption of this estate was made over by *Tyssen* after his bankruptcy, though before the assignment. Nothing therefore passed by this conveyance: and if *Bradley's* mortgage had been out of the case, and the plaintiff would then have purchased of him, after an act of bankruptcy, and then a commission had issued within five years, the assignees under that commission must have prevailed. Creditors after bankruptcy are in the nature of purchasers, and have a prior equity to any other persons: and here *Ward's* is a prior conveyance, but from a person who had nothing to convey. *Ward* could not come in at law as a creditor for this sum of 2000*l.* Besides, it is an imposition, the money never having been advanced; yet if it had been actually paid, as the legal estate was in *Bradley*, it would not have been any benefit to *Ward*; but he must have lost the money.

(69) Decreed therefore, as to this estate, that *Bradley* should re-convey to the plaintiff upon payment of principal and interest.

The next question is as to those estates which being incumbered by *Tyssen* before his bankruptcy, those

those incumbrances are since, by mesne assignments, vested in *Ward*. And here it appears that *Ward* has, after the bankruptcy, and before the plaintiff's assignment, got a release of the equity of redemption of those estates from *Tyssen* for 3600*l*.

Here the legal estate is in *Ward*: and the question is, Whether in a court of equity it shall be taken away without *Ward*'s being paid all the money he advanced? Though the rule be the same here as at law upon construction of statutes; yet where an act is to be carried into execution here, there are certain rules to be observed which will bind equally in case of an act of parliament, as of the common law. One of those rules is, that a purchaser for a valuable consideration, without notice, having as good title to equity as any other person, this court will never take any advantage from him; and consequently will not grant a discovery against him of the only equity he has to defend himself by; which, if he should be obliged to discover, the other party would immediately take advantage of. And there certainly may be cases where a purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in this court to discover any thing (whether incumbrances that he has got in, or any other thing) but all advantages shall be left him to defend himself. Suppose two purchasers without notice, and the second by chance gets hold of an old term; he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration, as himself. I do not therefore think a purchaser for a valuable consideration, without notice of the bankruptcy, to be relieved against in this court within 21 *Ja*. 1. The case of *Hitchcock* versus *Sedgwick*, 2 *Vern*. 156. is very different from this: for,

(70)

Difference as to notice between an act of bankruptcy committed, and a commission issued.

a commission is a public act, of which all are bound to take notice; but an act of bankruptcy may be so secret as to be impossible to be known: and therefore I think that *Ward* having the legal estate in him,

shall

shall by that be protected for so much as he really and *bona fide* paid Tyssen's bankruptcy.

And therefore directed an issue upon the point of notice; to try whether *Ward* had notice of Tyssen's bankruptcy, and when? And as to the other part of the estate, which (though not in *Ward* himself) was in others who were trustees for *Ward*, that must be considered as one and the same thing.

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Term. Paschæ

8 Geo. II.

IN CURIA CANCELLARIÆ:

Upton versus Prince. (f)

Case 18.

THE testator *William Prince*, a freeman of ^{25 and 26} *London*, had issue two sons, *William* and *Peter*, ^{April 1735.} A father advances some of his children with portions in his life-time, and then makes his will; and thereby recites he had advanced *B.* and *C.* but omits reciting *D.* (whom he had also advanced) and leaves to him a sum certain, and devises

and four daughters; and in his life-time gave his two sons, in order to settle them in the world, 1500*l.* a-piece; for which he took two several receipts, each in the following words; *Received of my father William Prince the sum of 1500*l.* which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son.* Sometime after the testator makes his will in the following words; *And whereas I have heretofore paid to, given or advanced with my children William, Elizabeth, and Sarah, the sum of 1500*l.* a-piece: now I do hereby, in like manner, give and bequeath unto my three other children, Peter, Mary, and Anne, the several sums of 1500*l.* a-piece; and then gives the residue equally amongst all his children.*

the residue equally among them: The money which *D.* had received shall go in satisfaction of the legacy left to him.

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(f) In *Reg. Lib. A. 34. fol. 237.* this case is stated thus: *William Prince* died leaving issue the defendants

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William

The custom of *London* being waved on all sides, the question was, Whether *Peter* should have a new sum

William and *Peter Prince*, his sons, and four daughters; the defendants *Elizabeth Grosvenor*, and *Sarah Dix*, widow, married in his life-time; and the plaintiffs *Mary Upton* and *Ann Eade*, unmarried at his decease. The defendants *William* and *Peter Prince*, soon after they came of age, desired the said *William Prince* to advance to each of them a sum of money towards setting them up in the world, and agreed that whatever he should advance should be part of what he should give them by his will: whereupon the said *William Prince*, on the 11th June, 1724, advanced 1500*l.* to the defendant *William Prince*, who gave the following note for the same:—"Received, June 11, 1724, of my father, Mr. *William Prince*, the sum of 1500*l.* which I do hereby acknowledge to be on account, and in part of what he hath given, or shall in and by his last will give unto me his son."—And the said *William Prince*, the father, about the 31st March, 1727, advanced 1500*l.* to the defendant, *Peter Prince*, who gave the same note as the said defendant *William Prince*; and the said *William Prince* afterwards, on the marriage of the defendant *William Prince*, made a settlement on the said defendant of divers freehold and leasehold houses, of a great yearly value; and the said *William Prince* made his will, dated the 17th August, 1730, and thereby ratified the limitations in the said settlement, and gave the residue of his term in his leasehold messuages, in the parish of *St. Magnus*, to the defendant *Peter Prince*; and taking notice that he had advanced with his children, the defendants, *William*, *Elizabeth* and *Sarah*, 1500*l.* a-piece, he thereby gave his other three children, the defendant *Peter Prince*, and the plaintiffs *Mary Upton* and *Ann Eade*, 1500*l.* a-piece: and he willed that the residue of his estate should be divided into six parts, and that one-sixth thereof should be paid to the defendant *William Prince*, one-sixth to the defendant *Peter Prince*, one-sixth to the plaintiff *Mary*, to the plaintiff *Ann* one-sixth, to the defendant *Benjamin Grosvenor* and *Elizabeth* his wife, the remaining sixth part to the defendant *Sarah* and her late husband *Thomas Dix*; and he appointed the defendants *William* and *Peter Prince*, and *Benjamin Grosvenor*, and the said *Thomas Dix*, executors of his will. The testator afterwards made a codicil to his will, and thereby gave several particular legacies, and he afterwards died with-

sum of 1500*l.* upon the latter words of the will? or whether he should not be in the same case with *William*; they both being equally advanced by the father, and this seeming only a mistake in the testator?

Mr. *Fazakerley* insisted, that the receipt given to his father could not controul the express gift of the father subsequent; and the father's omitting *Peter* in the mention of the advancement, should be plainly intended a difference between them; the receipts given by both, and the case of both being the same.

But the *Lord Chancellor* decreed the 1500*l.* received by *Peter* in his father's life-time, to be a satisfaction for what the father gave him by his will; and that he should not have another 1500*l.* upon the latter words.

out revoking the said will and codicil. That it was the said testator's intention that the said two sums of 1500*l.* paid to the defendants *William* and *Peter Prince*, should be deducted out of the legacies given them, and for that purpose he deposited the said two notes in a drawer with his will, and intimated that the said drawer should not be opened after his death by either of the said defendants, unless his other children, or one of his sons in law, were present; and shortly after his death the said drawer was opened in the presence of the said defendants and his other children, and the said will and codicil, and two notes, were found therein; and the defendants, *William* and *Peter Prince* insisted upon retaining the whole legacies given them, besides the 1500*l.* a-piece given them, and although they had signed such receipts as aforesaid. Whereupon his Lordship did declare that the sum of 1500*l.* advanced to the defendant *William Prince*, in the life-time of the said testator, is not to be discounted out of any thing given to the said defendant *William Prince*; but as to the sum of 1500*l.* advanced to the defendant *Peter Prince* by the said testator, his Lordship declared the same is in satisfaction of the 1500*l.* legacy given to the defendant *Peter Prince*.

Case 19.
26 April.

Menzey versus Walker. (g)

The father by marriage settlement has a power to make an appointment of a sum not exceeding a sum certain, for portions and maintenance of younger children, in such manner and under such limitations as he shall appoint. He has several younger children, and by his will (taking notice that the rest were provided for by their grandfather) he appoints the whole sum to one. This is not a good pursuance of his power.

MR. *Walker*, upon his marriage, settled his estate upon himself for life, remainder to his wife, remainder to trustees for a term of three hundred years, remainder to his first and other sons; and the trust of the term was declared to be for the raising such sum and sums of money for the portion and portions and maintenance of all and every child and children of that marriage (other than an eldest son) in such manner, and at such time, and under such limitations as he the said Mr. *Walker* should appoint by his last will, or by deed, under hand and seal, attested by three credible witnesses, so as such sum or sums do not in the whole amount to above 2000*l.* if but one younger child, or 3000*l.* if more than one; and so as all the sums for such maintenance do not in the whole amount to above 120*l.* per ann. and for want of such appointment, then in trust to raise such portion or portions equally to be divided amongst all his younger children, share and share alike, to be paid to them respectively at the age of twenty-one, or day of marriage.

The testator had three younger children; and by his will duly executed, reciting that his two daughters were amply provided for by their grandfather, he appoints the whole sum of 2000*l.* to his second son *Thomas Walker*. And the question was, Whether this appointment of the whole to one was a good appointment, and made pursuant to his power?

This cause was heard at the *Rolls*, where it was decreed to be not a good appointment; and now coming on to be heard before the *Lord Chancellor*,

Mr. *Attorney General*, &c. argued this appointment to be good; and said, that a difference was to

be made where such powers are to be executed by a stranger, and where by the father himself, who is a proper judge of the merit of each child; and consequently that the court will not interpose to set aside this distribution, considering the particular circumstances of this case; where, by the words of the power, he was not bound to raise the whole sum of 2000*l.* but might, if he had pleased, not have raised the tenth part of that sum.

The father in this case had a latitude; or else the providing how this sum should be divided, in case no appointment was made by him, would have been vain and idle: and if it was not necessary for him by the words, *to divide it equally*, this appointment made by him must be good. It is in proof here that the other children were provided for by their grandfather, and took good estates from him. Indeed where certain directions are given, that such and such sums shall be given to each child, there nothing is left either to the discretion of the party or of the court: but where this court has relieved against the execution of powers merely discretionary in their creation, it has not been for inequality only, but for some other piece of injustice or hardship. In the case of *Wall (b) versus Thorborn*, 1 *Vern.* 355, 414. relief was given, because there was no reason that one daughter should be looked upon in a different light from the others, she having no particular provision: but even in that case the court said, that the

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(b) Which case was this: Sir *George Crooke* by his will devised that his real estate should descend to his three daughters and heirs, provided that his wife should distribute it in such proportions as she should think fit. The mother, by deed executed in her life time, appoints a very small proportion for the plaintiff's wife, who was one of the three daughters, and had appointed the rest for the other two daughters; and the bill was to be relieved against this unequal distribution. Upon long debate, the court declared the case was proper and relievable in equity.

circumstances must be very strong to take away the power which the wife had by the express words.— And in that case (i) another is cited of *Sweetnam versus Wolaston*, where relief was denied. In that of *Thomas and Thomas*, (k) 2 Vern. 513. it is said, that this court will relieve against an unreasonable, but not an unequal distribution upon a special or particular power; which was the case of *Lister versus Robinson*, Mich. 1732. where a man gave a power to his wife, to devise such a sum to and amongst his child and children, and in such manner and proportion to each child as she should think fit; there were two children, and the elder being provided for, the mother appointed the whole to the younger: upon which appointment a bill was brought here for an equal distribution, but was dismissed. So in that of *Austin versus Austin*, heard by the present Lord Chancellor, March 2, 1733. where the words of the trust were, that if *Robert Austin* the father dies leaving by *Jane* his wife a son, and other issue then living, then and in such case to raise a sum not exceeding 1500*l.* as soon as may be, to and for the sole benefit and advantage of such child or children (other than the eldest son of that marriage) in such proportion, man-

(i) *Wall & uxor v. Thorborn.*

And in the same case, the plaintiff cited the case of *Cragrave v. Penost*, where a man having two daughters, one by a former wife, and another by his second wife, devised his estate to his wife to be distributed between his daughters as his wife should think fit. And she gave 1000*l.* to her own daughters, and but 100*l.* to the others; and the court there decreed an equal distribution.

(k) In this case the power was special and particular, that the wife might dispose to one or more; and not like the cases of a general trust in the executrix to distribute amongst the younger children at discretion; there an unreasonable and indiscreet disposition may be controlled by a court of equity; but this is *casus provifus*, it is expressly provided, that she might give all to one. And decreed the appointment made by the wife to stand.

ner and form, in all respects, as the said *Robert* should, for such purpose, by his last will in writing, direct and appoint, and in default of such appointment, then to and for the sole benefit of such child, if but one; and if more, other than the eldest, equally and in equal parts and manner, to all intents and purposes. *Robert*, by his will, directs the 1500*l.* to be raised; and gives 450*l.* to his son *Robert*, 1050*l.* to *Jane*, and nothing to *Edward*, who had an estate of 4 or 500*l. per ann.* given him by another; and he coming into this court for a share of the 1500*l.* his bill was dismissed: the power being discretionary, and nothing hard in the execution of it. The cases before mentioned will govern this; for, here the manner, the time, the limitation, are all reserved to him by the power, whereby he might have given it to one sooner, to the other later; to the one absolutely, to the other under a limitation; in which cases there would have been an inequality as well as in the present one. Indeed in *Austin's* case, there are not the words *in such proportion*; but there are words tantamount: and these powers being reserved to parents, in order to keep their children in due obedience, are highly reasonable, that parents may have a power of distribution, according to the merit or circumstance of each particular child.

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Mr. *Solicitor General*, Mr. *Pauncefort*, and Mr. *Fazakerley* argued on the other side against the validity of this appointment; and though they admitted, that perhaps where powers were general or discretionary, this court would not intermeddle; yet they insisted, that here the power was particular, and consequently must be strictly pursued: the argument of this power being executed by the father himself will not alter the case; for, by the words it is clear that a provision was intended for every child, and all the children are become purchasers of some provision under this power; the words being *for all and every of them*; and consequently, though the fa-

ther be a better judge than a stranger, yet being disabled by the words from excluding any of them, this court will take care that he, as well as any other, shall follow the rules of reason and justice,

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The discretionary power lodged in the father by this power, is first to be considered with relation to the eldest son, whose circumstances perhaps might not be able to bear so great a charge as 2000 *l.* or 300 *l.* and therefore the father has a power to charge the estate with such a sum as he should think his son's estate could bear, provided it did not exceed 2000 *l.* if but one younger child, or 3000 *l.* if more. It must next be considered with relation to the younger children; and there three things are left to his discretion, *viz.* 1. the time, manner, and the limitation; the time, whether it should be payable at the day of marriage, or at any other time? 2. the manner, which must be understood the manner of raising, and not of distributing the sum; this construction agreeing with the wording of the power in every clause, and the subsequent provisions making it clear; especially that which relates to advancement by the father in his life-time. 3. The limitations which he had power of making, but still for the children's benefit; for, one might marry imprudently, or be guilty of some other piece of folly, which might make it necessary for the father to limit the share of such child in such a manner as might be effectual and advantageous to that child. And his having a discretion in these cases, cannot give it him in the other respect of giving the whole to one, and nothing to the two others; such discretion being neither given nor intended to be given to him by the words of this power: nor will the two children's being provided for by the grandfather alter the case; the intent of the party's being to raise a portion for each by the trust. And it would be very unreasonable that a child becoming, by accident, able to do for himself by the bounty of some of his friends, should thereby lose the right he

he has of being provided for by his father. The case of *Wall* versus *Thorborn*, 1 *Vern.* 355, 414. is an exprefs authority. And in the cases of *Thomas* versus *Thomas*, 2 *Vern.* 513. and *Lister* and *Robinson*, there was an exprefs power of giving it to one of the children; and so not like this. So in that of *Austin* and *Austin*, the power was much more general, and entirely discretionary: but here is an unreasonable exclusion of two of the children, who have but a small provision, no way adequate to what their brother takes under this will.

Lord Chancellor. There are two questions: The first, Whether the power be pursued? The second, Whether it be executed in a reasonable manner?—As to the first, I think the words are as plain as they can be, that the execution of this power should be for the benefit of all the children. Indeed it was discretionary in the father how much should be raised; but he had no such discretion as to exclude one or the other. The words *in such manner* do clearly extend only to the manner of raising; there being several methods mentioned in the power; which was to make it as convenient as might be for the eldest son. The time also was under his discretion; whether it should be paid at marriage, or any other time; and so was the limitation: but still that is to be understood of the manner in which the portions should be settled upon them; whether it should be upon their respective marriage, or in what other manner he thought proper; and if he makes no appointment, then he fixes it upon the exprefs words, *to be equally divided between the children*; and the time that it shall be paid. Now after all this, how can this partial appointment be called an execution of his power? And is not that the present case? If then it be clear that he has not pursued his power, it is needless to enquire whether the provision made by him be reasonable or not? a void appointment being as no appointment, and consequently a failure of the appointment he was enabled to make by his power.

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power. Where there is a defective execution of a power, creditors or younger children are intitled to have that defect supplied: but where the execution is merely void, as in the present case, and when the court has interposed in such cases as this before us, it has always been where the execution, though perhaps within the words, was attended with some hardship or unreasonableness: so that if this depended upon the reasonableness or unreasonableness of the execution, I should not determine the point without some farther inquiry into the circumstances of these two daughters: but as a power *to all and every* can never be restrained to one only, I think the execution void, and so the second point is quite out of the question. In the cases of *Lister* and *Robinson*, and *Thomas* and *Thomas*, 2 Vern. 513. the words gave a general power; which being so, the court had nothing to do to restrain them. So in that of *Austin* and *Austin*, the father had a power with regard to the nomination of the child or children who should take and there the execution was highly reasonable, the person excluded being provided for five times as greatly as the other children: and so it would have been unreasonable in the court to rescind what he had done upon so just a ground.

So affirmed the decree. (1)

Note *Mildmay's* case, 1 Co. 175. a. 177. a.

(1) *Gibson v. Kinven*, 1 Vern. 66. *Wall v. Thorborn*, *ibid.* 355. S. C. 414. *Thomas v. Thomas*, 2 Vern. 513. *Chadwick v. Doleman*, *ibid.* 528. *Fermyn v. Fellows*, post. 95. *Tomlinson v. Dighton*, 1 P. Will. 149, *Astry v. Astry*, *Prec. in Chanc.* 256. *Chapman v. Brown*, 3 Burr. 1626. *Brownsmith v. Denny*, Hil. 29 Geo. 2. (cited 2 Wils. 337.) *Adams v. Adams*, Cowp. 651. *Maddison v. Andrews*, 1 Ves. 58. *Alexander v. Alexander*, 2 Ves. 640, *Macey v. Thurmer*, 1 Atk. 389. *Cavendish v. Cavendish*, B. R. Hil. 1782, (cited 2 Bro. Cha. Rep. 22.) *Mallison v. Andrews*, (cited 2 Bro. Cha. Rep. 22.) *Pocklington v. Bayne*, 1 Bro. Cha. Rep. 450. *Robinson v. Hardcastle*, 2 Bro. Cha. Rep. 22. *Dunrnford and East's Rep.* 2 vol. 241. S. C. *Pitt v. Jackson*, *ibid.* 54.

Burlingh v Pearson 1 Yes 281
Adams v Adams Cowp rep 651

*Mallabar versus Mallabar. (m)*Case 20.
6 May.

THE testator, *Thomas Mallabar*, by his last will devised as follows; *Imprimis*, "I devise, "give and bequeath all and singular my messuages, "lands and hereditaments whatsoever, and where- "soever, in the counties of *Norfolk*, *Suffolk*, and "Cambridge, unto my sister *Esther Mallabar*, and "to her heirs and assigns for ever, upon trust, that "the same shall be sold by her or them, for the best "price that can be gotten for the same, as soon as "conveniently can be after my decease; and that "out of the monies arising therefrom, all my just "debts, of what kind soever, be paid; and after "payment of my debts, I devise, out of the re- "mainder of the money, the sum of 500 *l.* to my "sister *Mary Bainbrigg*, and also 500 *l.* to my sister "Girt's children, that shall be living at the time of "my decease, to be divided equally between them; "and also 500 *l.* to my nephew *Nicholas Mallabar*; "and also 500 *l.* to be divided amongst the children "of my late brother *James Mallabar*, which shall "be living at the time of my decease; *Item*, after "my debts and legacies paid as aforesaid, and sub- "ject to the same, I give and bequeath all the rest "and residue of my personal estate unto my said "sister *Esther Mallabar*; whom I do hereby con- "stitute and appoint sole executrix of this my last "will and testament."

Where a man devises his real estate to be sold to pay debts and certain pecuniary legacies; and subject to his debts and legacies devised his personal estate to his sister: this court will not supply the defect of a surrender of the copyhold to the use of the will, if the other estates suffice to pay the debts.

The executrix brought her bill against *Nicholas Mallabar*, the heir at law of the testator, to prove the will, and to have the estate sold, and the debts and legacies paid according to the will; and charged that the testator had not surrendered all his copyhold estate to the use of the will, but some part of it only. And suggested, that the testator's whole

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estate, real and personal, included such parts of the copyhold as were not surrendered; and therefore insisted, that the defect of the surrender should be supplied. The defendant, in his cross bill, insisted, that there was more than sufficient, excluding the copyhold, which was not surrendered, to pay all the debts; and therefore insisted, that the surrender should not be supplied. (n)

Both causes came to an hearing together: and the plaintiff in the original bill having, in her second answer to the cross bill, confessed that the testator's estate, exclusive of the copyhold not surrendered, was more than sufficient; the *Lord Chancellor* refused to supply that defect against the heir; and dismissed the original bill with costs as to that point. The

(n) *Drake v. Robinson*, 1 P. Will. 443. 2 Eq. Cas. Abr. 232. pl. 10. S. C. *Hastewood v. Pope*, 3 P. Will. 322. *Coombes v. Gibson*, 1 Bro. Cha. Rep. 273. the result of which cases seems to be, viz. that where the real estate generally is devised for or charged by will with the payment of debts, copyhold lands which are not surrendered to the use of the will, do not pass thereby, if there be freehold sufficient to answer the purpose; otherwise it shall, and the court will supply the surrender; but this is to be understood of the legal estate only, for a devise of a copyhold estate without a surrender, is sufficient to pass the copyhold, where the devisor had only the equitable interest; the surrender must be by the person who has the legal estate; and when there is no legal estate in the party who has the beneficial interest, that may pass by a will without a surrender. *Car v. Ellison*, 3 Atk. 74. *Tufnall v. Page*, 2 Atk. 27. Vide also *Challis v. Casborn*, *Proc. in Chanc.* 407. in which case the *Lord Chancellor* would not supply the defect of a surrender, where there was a freehold estate, though the same was not sufficient for the payment of debts. *Eq. Cas. Abr.* 124. S. C. but in *Harris v. Ingledew*, 3 P. Will. 97. where one by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by will, the copyhold, though not surrendered to the use of the will, were directed to be applied to the payment of the debts *pari passu* with the freehold.

≡ see *Hellier v. Tarrant* at end
of this volume p^{*288}

reason

reason whereof was; because she confessed the matter in her second answer to the cross bill, though she had charged the contrary in her original bill, and not disclosed the truth in her first answer to the cross bill, and therefore should be punished with costs.

Another point arose at the hearing, though not insisted on in the pleading; which was, Whether upon the will there was not a resulting trust for the heir? The plaintiff's counsel insisted, that here could be no resulting trust for the heir; first, because the testator had given a legacy of 500*l.* to the heir. Secondly, because the testator had directed his real estate to be sold for payment of his debts and legacies, and had therefore considered it as a personal estate; (o) and after payment of his debts and legacies, and subject to the same, had given all the rest and residue of his personal estate to his executrix the plaintiff: but if it should be construed to be a resulting trust for the heir, the testator's intent would be utterly defeated: for, then the personal estate must be first applied in ease of the real; and so the executrix would have but a troublesome affair, without any benefit or consideration; which could never be the testator's intent: and in order to shew clearly that was the testator's intent, they insisted upon giving parol evidence.

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Lord Chancellor. If this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence: but as it has been done, and particularly in the cases of *Doxey* versus *Doxey*, (p) and *Littlebury* versus *Buckley*,
2 *Vern.*

(o) *Cook v. Duckenfield*, 2 *Atk.* 566, 568-9.

(p) *Rachfield v. Careless*, 2 *P. Will.* 159. *Duke of Rutland v. Dutcheys of Rutland*, *ibid.* 210. *Petit v. Smith*, 1 *P. Will.* 7. *Lady Granville v. Dutcheys of Beaufort*, *ibid.* 114.
Batchelor

2 *Vern.* 677. I now admit it to be done. Then was read a deposition of a witness, who gave full evidence of the testator's declarations, that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate.

But the *Lord Chancellor* decreed upon the will itself, independently upon the parol evidence, that here was (q) no resulting trust for the heir; and that the executrix should have the whole residue, after the sale of the estate, both of the money arising by such sale, and of the personal estate.

Batchelor v. Searle, 2 *Vern.* 736. *Hodgson and Caldecot v. Hodgson*, *ibid.* 593. *Cuthbert v. Bencock*, *ibid.* 594. *Lake v. Lake*, 1 *Wilf.* 313. *Brasbridge v. Woodroffe*, 2 *Atk.* 68. *Which v. Litchfield*, 2 *Atk.* 373. *Blinkhorn v. Feast*, 2 *Ves.* 28. *Goodinge v. Goodinge*, 1 *Ves.* 231. *Hampshire v. Penie*, 2 *Ves.* 216. *Hodgson v. Hitch*, *Prec. in Chanc.* 230. *Brown v. Selwyn*, *post.* 242. *Bacon's Tracts*, 99. *Fonnereau v. Poyntz*, 1 *Bro. Cha. Rep.* 474.

(q) *Coningham v. Mellish*, *Prec. in Chanc.* 31. *Rogers v. Rogers*, *post.* 268, and references.

Cafe 21.

Lechmere versus *Lady Lechmere.* (r)

13 May.

THE late Lord *Lechmere*, upon his marriage with the Lady *Elizabeth Howard*, daughter to the Earl of *Carlisle*, and in consideration of 6000 *l.* portion, covenanted with the Earl of *Carlisle* and the Lord *Morpeth* his son, to lay out, within one year after the marriage, the said sum of 6000 *l.* and likewise the farther sum of 24,000 *l.* amounting in the whole to 30,000 *l.* in the purchase of freehold lands in possession; which were to be settled upon the Lord *Lechmere* himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the Lord *Lechmere*, to preserve contingent remainders, remainder for so much as would amount to 800 *l. per ann.* to the Lady *Lechmere*, for her jointure, remainder of the whole to the first and other sons of the marriage in tail male, remainder to the trustees for five hundred years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the Lord *Lechmere*, his heirs and assigns for ever: but if there should be no daughters, that the said term was to cease for the benefit of the Lord *Lechmere*, his heirs and assigns for ever. And the said Lord *Lechmere* farther covenanted, that until the said 30,000 *l.* should be laid out in lands as aforesaid, there should be paid interest for the same after the rate of 5 *l. per cent.* unto the persons intitled to the rents and profits of the lands when purchased.

Money upon a marriage is agreed to be laid out in land in fee, and settled on husband and wife, remainder to their sons in tale male, remainder to the husband, his heirs and assigns forever: A covenant, that until the money belaid out in land, the interest to be paid to the persons who were to have the rents of the lands when purchased. The husband purchased several estates, but never settled any, and died intestate *sans issue*, leaving a considerable real estate to descend to his heir at law.

The Lord *Lechmere*, after his marriage, purchased several estates in fee simple in possession, but which

The heir may compel the administratrix, the widow, to invest this money in the purchase of lands; and the lands descended upon him will not go in satisfaction of the covenant, except as to such as were purchased after the covenant.

(r) 3 *P. Will.* 211. S. C.

were

were never settled according to the covenant; as also several terms and reversions, &c. and in the year 1727. died intestate and without issue, leaving a considerable real estate, to the value of about 1800 *l. per ann.* to descend upon the plaintiff, his nephew and heir at law. The Lady *Lechmere* took out administration; and the plaintiff brought his bill against her for an account of the Lord *Lechmere's* personal estate, and to have this covenant carried into execution; his remainder by the death of Lord *Lechmere* without issue now taking effect; as also to have some purchases completed which were left incomplete by the Lord *Lechmere's* death.

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The Lady *Lechmere* insisted by her answer, That the plaintiff, being no way privy to any of the considerations within this covenant, could not compel her to lay out the 30,000 *l.* in the purchase of lands for his benefit: but that if he could, the lands which Lord *Lechmere* had permitted to descend on him, being to the value of 1800 *l. per ann.* ought to be taken in full satisfaction for all the benefit the plaintiff could be intitled to as heir at law to the Lord *Lechmere*, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the *Rolls*, and there decreed (s) for the heir at law, Mr. *Lechmere*, upon both

(s) And for these reasons; first, for that the Lord *Lechmere* was compellable in equity to lay out this 30,000 *l.* and settle it agreeably to the articles; secondly, because the Lord *Lechmere* living after the year within which time the purchase was to be made and settled, had broken his covenant; thirdly, for that in consequence thereof, the trustees might have brought their bill, and compelled his lordship in his life-time to make such purchase and settlement; fourthly, for that the trustees not commencing their suit in equity, or at law, shall not prejudice any person entitled to have this settlement

both points; *viz.* That he was intitled to have a specific performance of this covenant; and secondly, That the several estates which descended upon him were not a satisfaction for this covenant, or any part of it; and now coming on to be heard before the *Lord Chancellor*,

Mr. *Pauncefort*, Mr. *Strange*, Mr. *Browne*, and others, argued for the plaintiff, That he could not in this case be considered as a mere volunteer, but was in some sort a purchaser; according to *Jenkins* and *Kemish's* case, *Hardr.* 395. *Lev.* 150, 237. But that though he should be taken for a volunteer, yet he must prevail against an administratrix: and this to serve the intent of the Lord *Lechmere*, who by his covenant has said, That his heirs at law should have an interest in the land, and in the money until the land be purchased. That the heir was in contemplation at the time of the Lord *Lechmere's* entering into this covenant, appears from the provision, that in case there should be no daughters; the term of five hundred years should cease for the benefit of him and his heirs. That wherever a man enters into a lawful engagement, and is prevented by death, or any other accident, from carrying his agreement into execution, the court will look upon it as performed. That the strength of this rule appeared from the case of *Sweetapple* versus *Bindon*, 2 *Vern.* 536. where the husband was decreed to stand in the same condition as if the money had been actually laid out in land; although no rule of law be clearer, than that the husband shall never be tenant by the curtesy but where he has reduced his wife's estate into possession during her life. That though every tenant in fee has his heir in his power,

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tlement made; fifth, in regard the land descended, and which was under the value of what the Lord *Lechmere* was bound to settle, shall not be taken for or towards satisfaction of the lands articulated to be settled. 3 *P. Will.* 214.

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yet, if the ancestor does nothing to divest the natural right which his heir hath to succeed him, and to have a specific execution of his covenant, he shall always prevail against the executor or administrator, even when the covenant was merely voluntary; as appears by the case of *Holt versus Holt*, (t) 2 Vern. 322. the trustees neglecting to compel the Lord *Lechmere* in his life-time to perform his covenant, cannot prejudice either party who is intitled to have it carried into execution: for, if so, the doctrine of this court would be intirely overturned; and trustees would become judges whether and how far men should be bound by their covenants: but by the known rules of this court trustees are bound to execute the trust in the manner the persons that made the conveyance have directed; and have no latitude of judgment left to them, to distinguish whether the conveyance be made upon a valuable consideration or not? or, whether the persons claiming under the trust be volunteers or purchasers? If then the neglect of the trustees will not affect the case one way or the other, the whole must depend upon the equity of the heir and administratrix. And taking the heir even but as a volunteer, yet he is such a volunteer as is greatly favoured both at law and in this court; and will always appear in a more favourable light than an executor or administrator: as appears from the several cases of *Kettleby versus*

(t) In which case the father of *A.* articted with a carpenter to pay him 1000 *l.* for the building of an house upon his land, and the carpenter articted with the father to build the house. The father died intestate before the house was begun to be built, and the land on which the house was to be built, descended to the son and heir. Held, that the son might compel the widow and administratrix of the husband, to lay out the 1000 *l.* in building the house, although the son, who sought, and was allowed to take the benefit of this covenant, did not entitle himself thereto by any manner of consideration.

Atwood,

Atwood, (u) 1 *Vern.* 298, 471. *Knight* versus *Atkins*, (w) 2 *Vern.* 20. *Baden* versus *Com. Pembroke*, 2 *Vern.* 52. *Lancey* and *Fairchild*, 2 *Vern.* 101. *Lingen* and *Sowray*, (x) *Eq. Ca. Abr.* 175. and *Vernon* versus (y) *Vernon*, in the House of Lords in 1732. and *Kentish* versus *Newman*, (z) *July* 1713. where a feme

(u) In this case it was agreed by marriage articles, that the wife having 1500*l.* portion, the husband should add 500*l.* more to it; and that the whole should be deposited in trustees hands, until a convenient purchase could be found for investing the same in land, which, when purchased, should be settled on the husband and wife for their lives, with remainder to their first, &c. son in tail, remainder to their daughters in tail, remainder to the right heirs of the husband. Before the making of the purchase the husband died, leaving issue by his said wife a daughter, who died about a month old. The wife administered to the husband and daughter; and the heir of the husband brought his bill to have the money laid out in the purchase of land to be settled on the wife for life only, remainder to the plaintiff in fee; and though the then Lord Keeper *North* refused to make a decree for that purpose, and dismissed the bill, but without costs, yet the party did not think to rest there, but reheard the cause before the Lord Chancellor *Jefferies*, who decreed for the heir, holding, that the money was bound by the articles, and should be for the benefit of the heir, as the land would have gone, if purchased. 1 *Vern.* 299, 471.

(w) Upon marriage articles 1500 *l.* was the wife's portion, to which the husband was to add 1500 *l.* the whole 3000 *l.* to be invested in land and settled on the husband for life, remainder to the wife for her jointure, remainder to the heirs of their two bodies, stopping short there, and not expressing where the estate should go afterwards. The husband died without issue, upon which his collateral heir brought his bill to have the money laid out in the purchase of land to be settled on the wife for life, remainder to the plaintiff in fee, as heir at law to the husband. And accordingly the Lord *Jefferies* decreed the whole money to the heirs of the husband, on a presumption that it was so intended.

(x) 1 *P. Will.* 172. S. C. *Prec. in Chanc.* 400 S. C.

(y) 2 *P. Will.* 594.

(z) 1 *P. Will.* 234. S. C.

(84)

being possessed of 200*l.* the husband before marriage covenanted to join so much to her 200*l.* as would purchase 30*l. per ann.* to be settled on them two, and the heirs of their bodies, remainder to the husband in fee; and until the settlement made, the 200*l.* to be taken as part of her separate estate; and if no settlement made during the husband's life, and she survived, then to remain to her; but if he survived, then to go to her brothers and sisters: the marriage took effect in 1688. and they had issue a daughter; the wife died in 1711. before the husband, no purchase having been made: upon a bill brought by the daughter, she had a decree against the brother and (a) sister of her mother, though the money had not been laid out within the time provided by the articles; the court looking upon the purchase as compleated. This case not only fully proves the right of the heir, but likewise that he shall not lose that right through any accidents preventing the execution of agreements within the time prefixed. Here are no creditors, no want of assets, and consequently no equity, to prevail against the heir. They farther insisted, That if this covenant was to be carried into execution, it could not be done partially; but being equally binding as to all parties, all are equally intitled to the benefit of the execution: that therefore it could not be confined singly to the purchase of lands of 800*l. per ann.* for the Lady *Lechmere's* jointure; but the whole must be carried through, and limited to the heir in the manner it would have been limited to the Lord

(a) This case seems to have been determined upon what was the intention of the parties to the articles; for they could not be presumed to provide for the wife's brothers and sisters, before the daughter who was the issue of that marriage; and therefore the court construed the meaning of the articles to be, that if the wife died before her husband, without issue, then, but not otherwise, the money should belong to the wife's brothers and sisters, from and after the death of the husband.

Lechmere himself, had he been alive. The Lady *Lechmere* cannot vary the execution of the articles; and the covenant being to lay out the whole sum of 30,000 *l.* which is an entire covenant, cannot be restrained to a covenant for purchase of lands of 300 *l.* *per ann.* only for the Lady *Lechmere*'s jointure. This method would be admitting the representative to contradict what the Lord *Lechmere* himself has said should be land, and land for the benefit of his heir: which appears from the provision, that until the lands purchased, interest at 5 *l.* *per cent.* should be paid to such persons as should be intitled to the rents of these estates. Many of the cases cited were not so strong as the present one, being founded upon voluntary agreements; which nevertheless have been carried into execution for the benefit of the heir against the executor: and insisted upon that of *Vernon (b)* versus *Vernon*, as a case in point, and no way distinguishable from the present; the matter resting upon the covenant in that case as well as in this; and the execution of that covenant decreed in favour of the heir against the wife, both in this court and in the House of Lords; notwithstanding all the same objections made there in her behalf that can be made here for the defendant.

(85)

To the second point they argued, That the Lord *Lechmere* having not done any thing in his life-time

(b) 2 *P. Will.* 594. decreed first by Lord *King*, and afterwards in the House of Lords, which case was this. *A.* covenanted on his marriage to lay out 7000 *l.* in land, and settle it on himself for life, remainder to his wife for life, remainder to the first, &c. son of the marriage in tail male, remainder to the heir male of the body of *A.* remainder to *A.*'s brother for life, remainder to his first, &c. son. Now though this remainder seemed merely voluntary, and out of all the considerations of the marriage settlement, and though *A.*, as was there urged, had the land been settled by him in his life-time, might have barred the brother by a common recovery, yet on *A.*'s leaving only a daughter, equity compelled a specific performance of the covenant.

to shew his intent that these late purchases should go in satisfaction of his covenant, in part or in the whole, no supposed intent could prevail against the heir for the administratrix, she not having so good an equity as he; especially seeing that suppositions may be, as well one way as the other. That the cases of satisfaction depend upon the particular circumstances of each case, appears from the cases of *Duffield versus Smith*, and *Goodfellow (c) versus Burkett*, 2 Vern. 258, 298. and also from the intent of the parties; as is most manifest from that of *Saville versus Saville*, where the only difference was between a descent of lands in fee, which by the settlement were to be a satisfaction; and that which happened, of a descent of lands in tail of equal value, of which the daughters might, by levying a fine, have made themselves tenants in fee; and yet held there not to be a satisfaction; because the intent was, that the fee simple lands should descend. In the present case it does not appear that the intent was, that those fee simple lands should go in satisfaction: for, if he had so intended, he would have acquainted the trustees with his design of performing so much of his contract by these purchases: and as no intent appears, it is no more than if the Lord *Lechmere* had given a bond to his heir, and had

(c) in this case a man on the marriage of his daughter, gave a bond to her husband for part of her portion, after which by his will he gave her land of much greater value, and yet this was held to be no satisfaction, although there were not assets to pay debts. And there it is laid down as a rule, that where a legacy has been decreed to go in satisfaction of a debt, it must have been grounded upon some evidence, or at least upon a strong presumption that the testator did so intend it.

However this case might be determined on another principle, viz. that money and land being of a quite different nature, the one shall never be taken as a satisfaction for the other. Vide 2 P. Will. 227 note (E) *Chaplin v. Chaplin*, *ibid.* 247.

then

then permitted these lands to descend upon him; in which case it cannot be pretended, that the descent would have been a satisfaction for the bond, or that the administratrix could have defended herself against this demand by such an argument. So if he had owed 1000*l.* to his next of kin, the distributive share would never have been taken as a satisfaction for the debt. A less (*d*) thing cannot go in satisfaction for a greater; as in *Atkinson's* and (*e*) *Webb's* case, 2 *Vern.* 478. But an equivalent must be given, which must appear to have been intended as a satisfaction. And in that of (*f*) *Eastwood* versus *Vink*, *Apr.* 1732. it was held that a devise, which was to go in satisfaction, must be of the same nature as the thing for which it was to be an equivalent; and therefore held there that money could not go in sa-

(86)

(*d*) *Blandy v. Widmore*, 1 *P. Will.* 324. and the cases and observations contained in note 1.

(*e*) *A.* gives a bond to *B.* her servant to pay her 20*l.* per annum quarterly, for her life, free from taxes; and by will, taking no notice of the bond devised to her 20*l.* per annum, for her life, payable half yearly, but not said to be free from taxes. *Lord Keeper.* The annuity devised not so beneficial, as that secured by bond; that which is less not to be presumed in satisfaction of that which is greater; and decreed the annuity additional, and not as given in lieu or satisfaction of the bond. Vide also *Duffield v. Smith*, 2 *Vern.* 258. *Masters v. Masters*, 1 *P. Will.* 423, *Chanc. Cases*, *ibid.* 408. *Cuthbert v. Peacocke*, 1 *Salk.* 155. *Thomas v. Bennet*, 2 *P. Will.* 343. *Crompton v. Sale*, *ibid.* 553. *Graham v. Graham*, 1 *Vesf.* 262. *Nicholes v. Judson*, 2 *Atk.* 300. *Sparkes v. Robins and Cope*, *ibid.* 491. *Clark v. Sewell*, 3 *Atk.* 96. *Heather v. Rider*, 1 *Atk.* 426. *Haynes v. Mico*, 1 *Bro. Cha. Rep.* 129. *Jeacock v. Falkner*, 1 *Bro. Cha. Rep.* 295. *Devese v. Pontel*, (reported by Mr. Finch, in a note upon the case of *Brown v. Dawson*, in his edition of *Prec. in Chanc.* p. 240,) at the Rolls Michaelmas 1785. *Rickman v. Morgan*, 1 *Bro. Cha. Rep.* 63.

(*f*) 2 *P. Will.* 616. *S. C.* *Chaplin v. Chaplin* 3 *P. Will.* 247. *Barret v. Beckford*, 1 *Vesf.* 521. *Grave v. Earl of Salisbury*, 1 *Bro. Cha. Rep.* 425.

tisfaction for land, nor copyhold for freehold, &c. How then according to these rules, can several of these purchases be called a satisfaction? There are terms, reversions, &c. which are not only less in value, but from their nature cannot be limited according to the uses intended by the covenant, which was to purchase freehold lands, and lands in possession; and it is therefore very strange to think that the Lord *Lechmere* should make purchases, and intend them to go in satisfaction of his covenant, which, he very well knew, could not from their nature or their value answer any description of those he had agreed to purchase: such a construction, besides its absurdity, would go in direct contradiction to the well known maxim, that an heir is not to be disinherited by a constructive, but a necessary implication only.

(87) Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Fazakerly* argued for the defendant, that the consideration, upon which this covenant was made, extended no farther than to the Lady *Lechmere* and the children of the marriage, but not at all to the heir; who therefore could be looked upon but as a mere volunteer, and as such had no claim to any equity. That the naming *the heirs* in the covenant, was only to shew what should become of the land when the other limitations should be spent: and the provision, that the interest should be paid to such as should be entitled to the rents and profits of the estate, was no more than what must have been if it had not been inserted; and so fall within the rules of *expressio eorum, &c.* That it was necessary to explain for what purpose the five hundred years term was raised; and to provide that in case of failure of daughters, it should sink in the inheritance, in order to prevent its becoming legal assets; which it must otherwise have done. That there was a great difference between a limitation to the heirs of the body, and a general remainder to one and his heirs; the heir being in the former case, under

under the immediate contemplation of the parties, but not so in the latter. And that this court considers even a covenant but as *nudum pactum* in the case of volunteers: for, though it be a court of conscience, yet that is only to aid such as are in conscience intitled to a performance of the covenant; which cannot be said of a volunteer, unless he, by some particular circumstances, takes himself out of the general rule. Then as to the nature of the obligation, here are no trustees appointed, but the whole rests singly upon the Lord *Lechmere's* covenant; which is but a personal lien, and must fail whenever he himself becomes intitled to the benefit of what was to be performed by that obligation. *The rule that what is covenanted to be done is looked upon as done*, holds only in cases where somewhat is vested either in trustees, or some other manner, whereupon the covenant may be a lien; but not where it is a mere personal obligation, as in this case, the whole remaining in the persons own hands. This difference appears from the case of (g) *Lingen* versus *Sowray*, *Eq. Cas. Abr.* 175. where there was, as appears by the decretal order, an assignment of securities to trustees to be laid out in land, and to be settled; the trustees did not actually receive the securities; but sometime after the marriage the husband called in part of the money himself, and settled it upon the same persons as it was to have been settled upon by the marriage settlement: he afterwards made his will, and devised his personal estate to his wife, against whom a bill was brought by the nephew as heir at law; and it appearing that 700 *l.* remained upon the same securities at his death as at the time of settlement, it was decreed, that the 700 *l.* should be looked upon as land; but that the other part that was actually taken out by him should not be bound. And the court would not in that case admit the representative of the covenantor to say that his

(g) 1 *P. Will.* 172, *S. C. Prec. in Chanc.* 400, *S. C.*
 ancestor

ancestor had broke his covenant. The like distinction in the case of *Chaplin* versus *Horner*, (b) 18 March, 1718. at the *Rolls*; and in that of *Chichester* versus *Bickerstaff*, (i) 2 *Vern.* 295. It is held, that though money shall in many cases be considered as land, when bound by articles in order to a purchase made; yet whilst it remains still money, it shall be deemed part of the personal estate of such person who might have aliened the land in case a purchase had been made. And in the cases of the Countess of *Warwick* and *Edwards, Knight* versus

(b) 1 *P. Will.* 482. S. C. where money was covenanted to be laid out in the purchase of lands and to be settled on *A.* in fee, and *A.* himself having afterwards received part of this money, held to be a good payment, and not to be repaid by *A.*'s executor to his heir; but *A.*'s heir was decreed to be entitled to the remainder of the money not received by *A.*

(i) Where, upon Sir *John Chichester* marrying the daughter of Sir *Charles Bickerstaff*, Sir *Charles* articulated to pay 15000 *l.* as part of his daughter's portion, which, together with 1500 *l.* more to be advanced by Sir *John Chichester*, was, within three years after the marriage, to be invested in land, and settled on Sir *John Chichester* for life, remainder to his intended wife for life, remainder to their first, &c. son in tale male, remainder to the daughter in tail, remainder to the right heirs of Sir *John*, the husband within a year after the marriage, and his lady, both fell ill of the small pox, the wife died first, and three days after Sir *John* died, without issue, having made his will, and appointed his sister *Frances Chichester*, his residuary legatee. Sir *Arthur Chichester*, the brother and heir, brought his bill, claiming the money thus agreed to be laid out in land, the remainder in fee whereof, in case of failure of issue of the marriage, was to go to the heir of the deceased husband. *Sed per curiam*; this money which would have been land, as to the issue of the marriage, yet now the husband and wife are dead without issue, is turned into money again, and under the power of the husband, to dispose of it as he pleased. It should have gone to his administrator, had there been *no* will, *a fortiori* will it, in the present case, go to his residuary legatee. *Vide infra*, p. 90, note (a).

Atkins,

Atkins, Lancey (k) versus Fairchild, and Sweetapple versus Bindon, 2 Vern. 20, 101, 536. the sums were appropriated, and standing out in trustees hands; and so not like this case. And in that of *Knight versus Atkins*, the plaintiff was both heir and executor; as appears in 2 Chan. Rep. 400. Indeed the case of *Vernon and Vernon*, in the House of Lords, 1732. rested upon a bare covenant; but there was an express provision that the brother should have the benefit of the covenant, there being an express estate limited to him, upon which he might have had remedy against Mr. *Vernon* himself in his life-time: but it cannot be pretended that the plaintiff could in this case have had any remedy against the Lord *Lechmere* in his life-time; Lord *Lechmere* could have limited the remainder to any other of his relations, in bar of his heir at law. In the case of *Cann and Cann*, 1 Vern. 480. the court refused compelling the executrix to lay out the money in a purchase of lands whereof the husband would, by the articles, have been tenant in tail. The objection, that the covenant was entire, and consequently could not be partially executed, was endeavoured to be answered, by saying, that the Lady *Lechmere* did not come here to have the covenant carried into execution: but was ready to wave all the pretensions she had under this covenant, unless the court should think the heir intitled to have it carried into execution: and concluded this point by saying, The heir was as much a stranger to this covenant as the natural daughter was held to be to the covenant for farther assurance in *Foresaker's* and *Robinson's* case, *Eq. Cas. Abr.* 123. and that the Lord *Lechmere* having lived several years after his entering into

(k) In this case, money by marriage articles was to be laid out in land, and settled on the husband and wife and their issue, remainder to the heirs of the wife; the wife died in the life time of the husband; and decreed for the heir of the wife against her administrator.

this

this covenant, and having never carried it into execution; this long surceasing was to be taken as a change in his intention; and consequently the heir not intitled to a performance.

As to the second point they argued, that if the heir was intitled to have a specific performance of this covenant, the descent of lands to the value of above 30,000*l.* which he took from the Lord *Lechmere*, must be looked upon as a satisfaction. That wherever a thing is to be done either upon a condition, or within a time certain, yet if a recompence can be made which agrees in substance, though perhaps not in every formal circumstance, such a recompence shall be good, and shall go in satisfaction of the thing covenanted to be done. In the case of *Wilcox and Wilcox*, 2 *Vern.* 558. the descent of lands of the same value was held a satisfaction; though in that case the son was a purchaser; which the heir is not in the present case; and in that of *Blandy versus Widmore*, (1) 2 *Vern.* 709. the husband having covenanted to leave his wife 620*l.* at his death, and dying intestate, whereupon her distributive share came to 1000*l.* this was held to be a satisfaction; and in case of portions, they are held to be satisfied either by a devise; or where given by will, are likewise held to be satisfied by a gift in the party's life-time, though the will does not take effect till his death.

Lord Chancellor. The first question is, Whether the plaintiff, the heir at law to the lord *Lechmere*, be intitled to a specific performance of this covenant? It has been considered by the plaintiff's counsel as an agreement of the lord *Lechmere*, and an intent in him to lay out this whole sum of 30,000*l.* in lands at all events; on the other hand, the defendant's counsel have insisted, that the design went no farther than the providing for the lady *Lechmere*, and the

(1) 1 *P. Will.* 324. S. C.

issue of the marriage. The intent seems to me to be, that the 30,000*l.* should, at all events, be laid out in land; the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers: but as to the remainder in fee, I do not think that the looking upon the Lord *Lechmere* either as a purchaser of it or not, will vary the case; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved: and I think it quite the same whether he is considered as a purchaser, or as a volunteer; the dispute not being between the heir and a third person, but between the two representatives of the Lord *Lechmere*, the one of his real, the other of his personal estate; the heir's being but a volunteer in regard to his ancestor, will not exclude him from the aid of this court. But, though the question is between two volunteers, the court will determine which way the right is, and decree accordingly. We must therefore see whether the 30,000*l.* is, upon this covenant, to be looked upon as real or personal estate?

(90)

It seems to be allowed on both sides, that had the money been deposited in trustees hands, it must have been looked upon as a real estate, and the heir intitled to the benefit of it. This, I say, seems to be granted; and no authority against it, but what has been collected from the case (*m*) of *Chichester* versus *Bickerstaff*, 2 *Vern.* 295. It is probable that in that case the court went upon some reason which induced it to think that Sir *John Chichester* looked upon that

(*m*) With respect to this case, it is remarkable, that the wife died within three years after the marriage, during which period the purchase was to be made; so that the time was not come within which the money was to be laid out, and till then it continued money; or possibly, the court had some evidence to induce them to believe Sir *John Chichester* looked on the money as personal estate. *Vid. ante* 88. also *Note* 6. 3 *P. Will.* 221.

(91)

money as personal estate; for, otherwise the authority of that case is not to be maintained; being contrary to all the former resolutions, and to a late one in the House of Lords, by which I am bound, viz. that of the Countess of *Warwick* versus *Edwards*, (n) where the money was decreed to go as land, though to a collateral heir, who was not within the considerations of the settlement: so that it is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainder-man; unless there appears some variation in the parties intent. And indeed it is very reasonable that it should be so; for, otherwise the neglect of trustees, or any other accident, might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations. But it has been objected, that this case differs from all those; for, that the money was never deposited, but remained in the Lord *Lechmere's* own hands; and that he only was the debtor. So now the question is, Whether this will make any difference? An heir can no more be looked upon as a creditor against his ancestor, than he can be looked upon as a purchaser under him; he takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the Lord *Lechmere* bound himself, by his covenant, to lay out this sum of 30,000*l.* in land; he, on the other, acquired a right to an estate for life, and to a remainder in fee, which by his death are now severed, and the remainder only descends

(n) 2 *P. Will.* 271. S. C. In this case money was articulated to be laid out in land and settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the husband. There was issue, but such issue died without issue before the money was laid out; and decreed, that the money was to be looked upon as land, and should go to the heir, and which decree was afterwards affirmed in the House of Lords.

upon

upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one; but yet the heir is intitled to have the purchase completed, and may compel the executor to do it; because their rights are different; as appears from the case of *Holt* versus *Holt*, (o) 2 *Vern.* 322. And wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this court will never take from him. None of the cases cited warrant this present distinction that is endeavoured at; and in reason, I am sure, there is nothing to warrant it; the intent and agreement of the parties being the same in both cases; which if effectual in one case, I cannot see why it should not be so in the other. The only case, from which any thing like this distinction can be collected, is that of *Lingen* and *Sowray*; (p) but I am no ways satisfied that that case was resolved upon that reason; for, in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife; and the court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust: but here no change appearing, the intent remains as it was at the time of the covenant entered into; and consequently a very wide difference between the two cases. In the case of *Chaplin* versus *Horner*, (q) the husband alone was to have the benefit of the articles; and therefore not at all like the present case. I therefore think that this case falls within the common known rule, *that money articulated to be laid out in land is to be looked upon as land.* The Lord *Lechmere* was bound at the time of his death to lay out this money in land; by

(92)

(o) *Ante* 83.

(p) *Ante* 87.

(q) *Ante* 88.

which

which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by the death, the right which he had to the remainder descends upon his heir; and as it comes by his death, nothing that has been done by the Lady *Lechmere*, either as to the waiver of her jointure, or any thing else, can alter or defeat that right. Indeed to suppose it, would be absurd.

The cases upon satisfaction are generally between debtor and creditor; and the heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is, that it depends upon the intent of the party; and that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions; as, that the thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a lesser: (r) for, if otherwise, this court will compel a man to be just before he is generous; and so will decree both. But these questions are no way material in this case, which turns entirely upon my Lord *Lechmere's* intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear, that the whole sum of 30,000*l.* should be laid out from the time of the covenant. Then there are terms, with covenants to purchase the fee; but terms are not descendible to the heir, and so no satisfaction. The like of reversions; especially seeing the lives did not fall in during the Lord *Lechmere's* own life. But as to the purchases of lands in fee simple in possession, it is to be considered, that there was no obligation upon the Lord *Lechmere* to lay out the whole sum at one time. Now here are lands in possession, lands of inheritance, purchased; which though not purchased with the privity of trustees, yet it was natural for the Lord *Lechmere* to suppose that the trustees would not dissent from those pur-

(93)

(r) *Ante* 86. the cases cited in Notes *d* and *e*.

chases,

chases, being entirely reasonable; the design of inserting trustees being not to prevent proper, but improper purchases: and though they were not purchased within the year, yet nobody suffered by it; and so this circumstance cannot vary the intent of the party in a court of equity. The intent was, that as soon as the whole was laid out, it should be settled together; and not to make half a score of settlements. In the case of *Wilcox and Wilcox*, (s) 2 Vern. 558. the covenant was not perfected; nothing done towards it strictly, but some steps taken by the ancestor which seemed to be intended that way: and it is as reasonable to suppose these purchases to have been intended to satisfy this covenant in the present case, as it was to suppose it so in that. And so varied the decree as to this point only, viz. as to the fee simple lands in possession purchased since the covenant. (t)

(s) In this case a man upon his marriage covenanted to purchase lands of 200 *l. per ann.* and to settle them on himself for life, remainder to his wife for life, for her jointure; remainder to his first son in tail male, remainder to his daughters in tail; and the father purchased lands of 200 *l. per ann.*, after which he made no settlement, but permitted them to descend. Whereupon this was decreed to be a satisfaction of the covenant. The book takes notice, that the lands were worth 200 *l. per ann.* which imports, that they were just of that value; and this plainly shews, that the lands were bought with an intention to satisfy the covenants, and the eldest son could not complain, when he had his 200 *l. per ann.* from his father, that it was another estate than what was covenanted to be settled upon him; viz. that it was a fee simple instead of an entail.

Vide *S. P. Tooke v. Hastings*, 2 Vern. 97. *Roundell v. Breary*, 2 Vern. 482. *Deacon v. Smith*, 3 Atk. 323. *Attorney General v. Whorriwood*, 1 Ves. 540. *Sowdon v. Sowdon*, (reported by Mr. Cox in his note upon *Lechmere v. Earl of Carlisle*, 2 P. Will. 228.) at the Rolls, Feb. 3, 1785.

Also *Pultney v. Earl of Darlington*, 1 Bro. Cha. Rep. 273. in which all the cases upon this subject were very fully considered.

(t) His Lordship declared that the late Lord *Lechmere's* covenant in his marriage articles to invest the

sum of 30,000*l.* in the purchase of freehold messuages, &c. of an estate of inheritance in fee simple in possession, to be settled to the uses therein mentioned, ought to be performed; and did order the same accordingly. And it appearing that the said Lord *Lechmere*, after the said articles, and after his marriage, purchased some messuages and lands for 490*l.* and other lands for 7100*l.* making in the whole the sum of 7894*l.* his Lordship declared that the same ought to be applied towards performance of the said covenant; and that the sum of 2210*l.* 6*s.* being the residue of the said 30,000*l.* over and above the said sum of 7894*l.* invested in the said purchases, ought to be raised out of the personal estate of the said Lord *Lechmere*, and invested in the purchase of freehold messuages, &c. to be settled to such of the uses contained in the said marriage articles, as are still subsisting. And it was further ordered, that the lands before-mentioned to have been purchased by the late Lord *Lechmere*, and such other lands as shall be purchased with the said 2210*l.* 6*s.* be conveyed to the uses following, *viz.* As to such and so much of the lands, &c. as shall amount to and be of the clear yearly value of 800*l.* to the use of the said Lady *Lechmere* for her life, for her jointure, and in lieu of her dower; and after her decease, to the use of the plaintiff *Edmund Lechmere*, and his heirs. And that the residue of the said estates be conveyed to the use of the said plaintiff, *Edmund Lechmere* and his heirs. And it was further ordered that the master do compute interest at 4*l.* *per cent. per ann.* for the said sum of 2210*l.* 6*s.* from the death of the said Lord *Lechmere*; and that the said sum of 800*l.* *per annum*, to be paid thereout, to, or retained by the said Lady *Lechmere*, in satisfaction of the arrears of her jointure of 800*l.* a-year, that the surplus interest over and above the said 800*l.* a-year, be paid to the said plaintiff *Edmund Lechmere*; and that the growing interest of the said 2210*l.* 6*s.* be applied in like manner, until the same is invested in the purchase of lands as before directed. And the Lady *Lechmere* was directed to account for the personal estate of Lord *Lechmere*; and all parties to be paid their costs out of the personal estate of Lord *Lechmere*, to be taxed by the master. *Reg. Lib. An.* 1734. fol. 487.

Jermyn versus Fellows.

Case 22.

16 and 17

May.

BY a private act of parliament, 13 Will. 3. intituled, *An act for enabling Stephen Jermyn to make provision for his younger children, and for the advancement of his eldest son*, it was enacted, that the sum of 3750 l. remaining in the chamber of London, and the interest thereof, should be vested in trustees named in the act, upon trust that they should, by and with the consent of the said *Stephen Jermyn*, the father, in his life-time, by any writing under his hand, testified in the presence of two or more witnesses, dispose of the said sum unto and among *Stephen Jermyn* the son, *Martha* and *Catherine Jermyn*, (daughters of *Stephen Jermyn* the father) and the survivors and survivor of them, and such other child and children as the said *Stephen Jermyn*, the father, should hereafter have, in such manner, proportion and proportions, and at such time and times as the said *Stephen Jermyn* the father, by his last will in writing, or other deed under his hand and seal, testified by two or more witnesses, should limit and appoint; and in default of such appointment, or for so much of the said 3750 l. whereof no appointment should be made, then unto and amongst such and so many of the said *Stephen Jermyn* the son, *Martha* and *Catherine*, and the survivors and survivor of them, and such other child and children as the said *Stephen Jermyn*, the father, should hereafter have, and should not be provided for out of any part of the 3750 l. share and share alike; and in case any of them died before twenty-one or marriage, then his or their share to go to the survivor or survivors.

Where there is a sum of money provided for younger children; one of the younger becomes eldest, he shall have no part of this money; but where the money was, by a private act of parliament, to be appointed among *A. B.* and *C.* (naming them) and *A.* afterwards becomes eldest, he is capable of an appointment in his favour;

At the time of this act made, *Stephen Jermyn* had five children; *John* his eldest son, *Stephen* his second son, *Mary*, *Martha*, and *Catherine*; *Mary* was provided for before the act passed, upon her marriage, and so recited in the act; *John* died soon after the act passed, under age and without issue, in his fa-

(95)

ther's life-time; whereupon *Stephen* the second son became intitled to the provision made for the eldest son; *Martha*, upon her marriage, had 1050*l.* appointed to be paid her by the father, in full of her share of the said 3750*l.* and *Catherine* married the defendant *Fellows*, and died after having attained her age of twenty-one; (no part of the 3705*l.* having been appointed to her) and left several children; after her death, upon the 23d of *June* 1720. *Stephen Jermyn*, the father, by deed duly executed, directed the trustees to pay the remaining 2700*l.* to his son *Stephen Jermyn*, his executors and administrators, and died soon after; then died *Stephen* the son, leaving issue the plaintiff, who claimed under this appointment made to his father: the defendant insisted, that *Stephen* becoming eldest son by his brother *John*'s death, became intitled to the provision made for the eldest son; and ceasing to be a younger child, became thereby incapable of taking by force of the appointment; and so he being disabled, and *Martha* having been fully provided for out of the 3750*l.* the remaining 2700*l.* belonged to him as administrator of his late wife; it being a part not appointed according to the direction of the act.— The question was, Whether this appointment to *Stephen Jermyn* the son, being eldest son at the time of the appointment made, was a good appointment within the meaning of this act?

Lord Chancellor. It is clear from the words of this act, that the legislature intended to provide for *Stephen*, *Martha*, and *Catherine*, and for any other younger children which *Stephen Jermyn*, the father, should have; and without doubt, *Stephen* was at that time considered as a younger child. The father, pursuant to his power, made an appointment to *Martha* and her husband of 1050*l.* which was accepted by them in full of *Martha*'s share; so that she is quite out of the case. And the only question is, Whether the appointment to *Stephen* the son of the remaining 2700*l.* be a good appointment?—

And

And the intent of the act has been much relied on; and it has been compared to marriage settlements, when younger children are so called in opposition to him who takes the estate; although that, in the strictly grammatical sense, the second born can never be called the eldest. The case of *Chadwick* versus *Doleman*, (u) 2 Vern. 528. was much stronger. For, there he was younger son at the time of the appointment made, and yet it was brought back again seven years after. That case arose upon a settlement; this arises upon an act of parliament, in which the intent shall prevail against the very words; but then that intent must be plain and clear: now *Stephen* is indeed called a younger child (w) in the preamble;

(u) In that case *A.* by marriage settlement was tenant for life, remainder to trustees to raise 4000*l.* for younger children's portions, as *A.* should appoint; remainder to his first, &c. sons in tail. *A.* appoints the 4000 *l.* among his younger children, and particularly 2600*l.* thereof to *B.* his second son. The eldest son dies six years afterwards, whereby *B.* became eldest son, and entitled to the whole estate after his father's death; and thereupon *A.* makes a new appointment of the 2600*l.* to one of his daughters. Decreed the last appointment to take place; the first being made to *B.* upon a tacit or implied condition, that he should not become the eldest son.

The *Lord Keeper* admitted the rule, that of voluntary deeds, and voluntary appointments, the fact is to take place, as well at law, as in equity; and likewise admitted, that the defendant, at the time of the appointment, was a person capable to take, and was a younger child within the power of appointing; but he considered this as a *defeasible* appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir.

(w) As to those who are to be considered as younger children, vide *Beal v. Beal*, 1 P. Will. 245. *Butler v. Duncomb*, *ibid.* 451. *Heneage v. Hunlocke*, 2 Atk. 456. *Duke v. Doidge*, (cited) 2 Vesf. 203.

(96)

but when the power of appointment is given, it is not to appoint amongst the younger children generally, but to *Stephen, Martha, and Catherine*. And it is observable that the power might have been executed, part at one time and part at another, by one or more deeds, or by his last will: nor was there any thing vested until an appointment made, but all was uncertain until he appointed. And the legislature had in view that there might be a death in the father's life-time, by reason of the words *survivor and survivors*. *Martha* being out of the question, nobody is to be considered but *Catherine* and *Stephen*; *Catherine* died long before the appointment, and consequently none in being at that time but *Stephen*: and I think it would be very hard to take it from him in favour of an administrator, who has no other right than she had; and that is none at all, she dying before the execution of the power, which was ambulatory until the father's death. So that this case differs greatly from that of *Chadwick* versus (x) *Doleman*, where the question was between the eldest son, become so by his brother's death, and the other younger children; all which had as good a right as Sir *Thomas Doleman* himself. Besides, the power in the present case is to appoint it to the *survivor or survivors*; and if *Stephen* be incapable of taking, there is nobody left to take; for, *Mary* was fully provided for before the act; *Martha* had accepted of 1050*l.* in full for her share, and *Catherine* died before the execution of the power; so that unless *Stephen* can take, the appointment must be merely void; and then it will come to this, that *Stephen* is the only person left who can take. In-

(x) The case of *Chadwick v. Doleman* appears to have been fully considered and approved of by Lord *Talbot*; for he does not object to, nor attempt to weaken it, but clearly distinguished it from *Fermyn v. Fellows*. Vide *Teynham v. Webb*, 2 *Ves.* 198. in which Lord *Cowper's* judgment is relied upon, and governed the decision of that case. Also *Broadmead v. Wood*, 1 *Bro. Cha. Rep.* 77. S. P. and the cases there cited.

deed he was a younger child at the time of the act made; but circumstances are since altered, there being nobody left but he: whereas in *Chadwick* versus *Doleman*, there were younger children capable of taking at the time, as well as Sir *Thomas Doleman* himself.

And so decreed the appointment to be good. (y)

(y) *Reg. Lib. An. 1734. fol. 621.*

D E

Term. S. Trinitatis

9 Geo. II.

IN CURIA CANCELLARIÆ.

Case 17.

14 June.

A. being in possession of the office of clerk of the crown, &c. in the King's Bench, in which *B.* has also an estate for life, procures *B.* to surrender, and solicits a patent for himself and *C.* and takes a note from *C.* promising to declare a trust for *A.* The patent afterwards is obtained; *A.* dies in debt, and without calling for a declaration of this trust; this note was

Bellamy versus *Burrow*.

THE late Mr. *Bellamy* (the plaintiff's father) was, by letters patent 4 G. I. intitled to the office of *King's Coroner and Attorney in the King's Bench*, to hold by himself, or his sufficient deputy, during his life, after the death of *Simon Harcourt* and *William Bordrigge*: Mr. *Harcourt* died in the year 1724. and the 9th of May in the same year, *Bordrigge* surrendered to the crown; whereupon Mr. *Bellamy* entered upon and enjoyed the office. About this time Mr. *Bellamy*, being desirous to have another life in the office, obtained new letters patent, May 14, 1724. granting the office to Mr. *Burrow*, who was his near relation, to hold by himself or deputy, during his life, after Mr. *Bellamy's* death; Mr. *Bellamy* acquainting the defendant that he had inserted his name in a warrant from the King for a grant of the office, wrote a note in the following words, viz. May 8, 1724. (which was the day before the surrender by *Bordrigge*, and some days before the date of the letters patent) "Whereas Mr. *Bellamy* "has caused my name to be inserted in a warrant "from the King for a grant of his Majesty's *Coroner* "and *Attorney in B. R.* in order for the passing of a

(z) *Reg. Lib. An. 1734. fol. 583.*

" grant

“ grant thereof, I do promise, at his request, to
 “ execute in due form any declaration of trust with
 “ proper and usual covenants that shall be reason-
 “ able; declaring my name is used in trust for the
 “ said Mr. *Bellamy*, his executors and assigns.”

This note was then signed by Mr. *Burrow* the defendant, and delivered by him to Mr. *Bellamy*; no other declaration of trust was ever executed by the defendant; but in *February* 1732. Mr. *Strutt*, being employed in Mr. *Bellamy*'s affairs, received orders from him to draw his will; and having received instructions from him for that purpose, (but none particularly concerning the crown-office), and apprehending from his general instructions that Mr. *Bellamy* intended to devise his patent office, and the profits thereof, in the same manner as he had directed all his other estate real and personal to be devised, inserted in the draught which he prepared the following clause, viz. *And as to the office commonly called the crown-office, whereof I am patentee, determinable upon my life, and the life of ——— Burrow, Esq; I give the said patent, and all benefit arising therefrom, to my executors, their executors and administrators in trust, to apply and dispose of the profits arising therefrom in the purchase of lands to be settled to the uses last above mentioned; and it is my will that my executors do not give up my right to appoint clerks generally to act in the said office, nor to the benefit of filing and copying affidavits; but to have recourse to all lawful means in the confirming my right in the said office, and to the profits arising therefrom, &c. And it is my will that the said Burrow do act in the said office as master thereof, for the benefit of my son, or appoint a deputy, as he shall think proper.* Mr. *Strutt* attending Mr. *Bellamy* soon after with the draught of the will, at the reading of this clause Mr. *Bellamy* was greatly surprised, saying he had given no such instructions; and directed the clause to be left out of the ingrossment of his will, it being no part of his intention.— Some days after Mr. *Bellamy* being desirous to see the
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the state of his affairs as drawn up by Mr. *Strutt*, directed him to make an alteration in relation to the crown-office in the following words, viz. *that Mr. Burrow might insure the crown-office for the first year, or until he should obtain a farther grant; and act in the same office himself, or appoint a deputy, as he should think proper*; and a day or two after he ordered this clause to be left out of his will, which accordingly was done, and his will duly executed by him; whereby he, after payment of his debts and legacies, devised his personal estate to his executors, in trust to invest the same, together with other monies arising from the sale of some lands, in the purchase of land, to the use of the plaintiff (his only child) and the heirs male of his body, remainder to his two sisters for life, remainder to the defendant *Burrow* in tail male, and made the defendant one of his executors. The testator soon after died, leaving a great load of debts, far exceeding his real and personal estate. The question was, Whether Mr. *Burrow* was, upon this whole case, to be looked upon but as a trustee, or whether he should hold the office in his own right?

The case was first heard at the *Rolls*, where the plaintiff's bill was dismissed, and the office decreed to Mr. *Burrow* in his own right, upon the following reasons:

Master of the Rolls. The ability of any person, to whom a patent is granted for the execution of an office relating to the administration of justice, is the foundation upon which the patent passes; as appears from *Winter's case*, Dy. 150. b. which was a grant of this very office; and from the Lord *Hobart's* opinion in the case of *Glover versus Bishop of Litchfield*, Hob. 143. and if it afterwards appears, that the person to whom such grant is made is unskilful and unable to execute it, such grant is void; as it was held by all the Judges in *Winter's case*: the reason is, that an office relating to the administration of justice highly concerns

concerns the public; and is not considered as the private property of the person enjoying it, independently of his skill and integrity in the discharge of his duty; and therefore grants of this kind being made upon this foundation, if there is any trust to be declared by the person to whom such office is granted, the crown ought to be privy to it; and the ability and integrity of the person for whose benefit it is should be known and approved. Nor do I think that a private dealing between two persons concerning a public office, (especially the crown-office, the due execution of which so greatly concerns the public) ought, for the reasons before mentioned, to receive any countenance in a court of equity: and there cannot, in this case, be the least pretence to determine it as a trust between the crown and the nominee; since the crown is no way privy to any trust declared or intended between the parties. Perhaps indeed it might be too hard to say, that all trusts of offices of this kind, which are held by patent, are void; and therefore the nature of this office, the circumstance under which the trust is declared, and the ability of the person for whose benefit it is declared to execute it himself, or appoint a proper deputy, are to be taken into consideration, and will, in some measure, govern the opinion of the court. But still, whatever may be the circumstances of any case relating to an office that concerns the administration of justice, I shall always be very careful how I sever the profits from the duty of it; the reason of which is founded in the relation of things: since without the observance of this, the dignity cannot be supported, nor the attendance recompensed, which are necessary for the due execution of it; by which means the public will suffer the more, in order to increase the gain of a private person.

The objections to Mr. *Burrow's* enjoying the office in his own right are, first, that he has given a *memorandum*, which in a court of equity will amount

to a declaration of trust. Secondly, that subsequent to this, and even shortly after the testator's death, he declared, that his name was used in the patent only in trust for Mr. *Bellamy*, or to that effect.— Thirdly, that the testator died insolvent; and therefore the grant to Mr. *Burrow* ought to be declared a trust for the benefit of his creditors.

To support the first objection, it has been said, that although the declaration was but imperfect and executory, and imported in strictness a farther act, which was never demanded by Mr. *Bellamy*, and consequently never done by Mr. *Burrow*; yet that part of it relating to the execution of a farther deed, makes it unnecessary; since the words are, *I do promise, at his request, in due form to execute any declaration of trust, with proper and usual covenants, declaring my name is used in trust for him*; from whence it was collected, that the words *is used in trust* were an immediate declaration, and in strictness took place when the paper was signed: but I do not think that any stress can be laid on this part of the *memorandum*; since the words *is used in trust* do manifestly refer to a future, and cannot be therefore construed into a present declaration; nor will any court strain or torture words to make them import what is evidently contrary to their plain meaning. Besides, the limitation in Mr. *Bellamy*'s will in favour of Mr. *Burrow* does, *prima facie*, prove that he intended to provide for him; and from Mr. *Strutt*'s evidence it is plain that he declined, at two several times, ascertaining the trust, or explaining himself concerning the crown-office. From all which it seems plain to me, that the *memorandum* signed by Mr. *Burrow* was only taken to make such use of it as, from the future behaviour of Mr. *Burrow*, Mr. *Bellamy* might think proper with regard to this office; and not as an actual declaration of trust: and Mr. *Bellamy*'s conduct at last does pretty clearly explain what his meaning was at the first. As to the second objection, Mr. *Burrow* might possibly declare that he looked upon
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himself as a trustee for Mr. *Bellamy*, knowing that he had executed that *memorandum*: but this only shews what Mr. *Burrow*'s sentiments were, not Mr. *Bellamy*'s, by which the present case must be governed.

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As to the last objection, *viz.* the insolvency of Mr. *Bellamy*, it cannot affect a matter of this consequence relating to the execution of an office of so great a trust, in which the confidence of the crown, and the good of the public, must be considered before the case of creditors. And so dismissed the bill; expressing in a particular manner his approbation of Mr. *Burrow*, with regard to his skill and probity in the discharge of his duty; and declared, that he did not doubt that if the *Lord Chancellor* should, upon an appeal, be of opinion that Mr. *Burrow* was but a trustee for Mr. *Bellamy*'s creditors; yet he would think (as his Honour should have done, had he been of that opinion) that Mr. *Burrow* was intitled to a very liberal allowance. This case was now re-heard by the *Lord Chancellor* upon the sole point of the trust.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Chute*, and Mr. *Daval* argued for the defendant, that there was a plain intention of kindness appearing by the will, from Mr. *Bellamy* to the defendant; and that such intentions have always, in construction of trusts of this kind, had a great weight with the court. That Mr. *Bellamy*'s intent at the time of the grant obtained seems uncertain, and to be ascertained afterwards by his future choice. That the wording of the note given by the defendant, shewed clearly that it was not intended as a present declaration of trust; but only to secure a future declaration upon Mr. *Bellamy*'s request, in case the defendant, who was then very young, should not behave to his satisfaction. Here was no demand ever made, nor the least pretence of misbehaviour in the defendant. And had Mr. *Bellamy* intended the profits of
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this office as an additional estate, he would surely have said somewhat of it in his will; wherein he is very particular in the disposition of all his estate, both real and personal: nor can he be said to have forgot Mr. *Burrow*, having limited several estates to him in remainder, and made him executor of his will. That when the person who drew his will had officiously inserted a clause, whereby this was declared to be a trust, he blamed him, and ordered that before the will was engrossed this clause should be left out, and nothing of it to be mentioned; which was a strong presumption that he intended it solely for the defendant's benefit: it being very strange to suppose, that had he intended him to be but a bare trustee, he should make no provision for him, but make him execute the office without any consideration at all. That though the intent seemed so strongly with the defendant, it was also worthy the consideration of the court, whether such an office, so highly concerning the administration of justice, could be granted in trust, the public being very much concerned in the execution of it? and as it must, by law, be granted to a person who is fit and expert, otherwise the grant is void, whether it was not proper and reasonable that the officer should have the profits to his own use? That the office of marshal was held in Sir *George Reynold's* case, 9 Co. 95. not to be grantable for years, for many reasons which will weigh as strong against dealings of this nature; particularly that which says, that in offices concerning the administration of justice, the trust which the law reposes in the officer is individual and personal; and that the law will not repose confidence in matters relating to the administration of justice in persons unknown. And that this being the case of creditors who were likely to remain unsatisfied, could not vary the nature of this office, which was no more liable to become legal assets than an office in fee, or a stewardship of a manor granted for life, could be deemed so upon judgment obtained against the ancestor, either in the hands of the heir in the first

first case, or against the grantee himself in the second case. *Dyer* 7. *b.* is an express authority that offices of trust are not assets; for, here the question was, Whether the profits of the *Philazer's* office could be taken in execution? and held they could not: for, execution can only be of such things as are grantable or assignable; which an office of *Philazer* is not, it being a personal trust that cannot be assigned. This resolution likewise shews how careful the law is in not severing the profits of an office from the duty of it. And in the great case of the Earl of *Oxford*, Sir *William Jo.* 127. it is held by *J. Dodderidge*, that no use can be of an office at common law. There never was an instance of a trust of such an office being carried into execution in this court. That of a master of this court was never yet attempted to be granted upon a trust; nor if it had, is it likely that such a trust would be countenanced here; and yet the office now in question is of as great confidence in the court of *King's Bench*, as that of a master is in this court. Nor can the court of *King's Bench*, in case this should be construed to be a trust, get at the *cestui que trust* to make him answerable in case of any misdemeanor; the person executing the office being the only one that they can take notice of. In Sir *George Reynold's* case, 9 *Co.* 97. *b.* it is said, that this very office of clerk of the crown, and other offices of other courts relating to the administration of justice, are to be granted in the same manner as they always have been granted; for, that otherwise good clerks will be deterred from applying themselves to knowledge, if such offices should become saleable, or transferrable from one to the other for lucre: and upon that also would arise corruption in the office, and extortion from the subject. If therefore this office is neither legal assets, nor liable to be taken in execution, because not assignable, according to *Dyer* 7. *b.* nor saleable, nor grantable for money, by *stat.* 5, 6 *E.* 6. *cap.* 16. then the profits of it cannot be accounted for upon a trust; the latter being as much within the *statute* as the former:

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former : for, there is but little difference whether I convey my office for a present sum of money, or upon condition that the grantee shall pay the profits of it to me ; and all corrupt bargains relating to the sale of offices being void by the *statute*, if such a proceeding as this was to meet with any countenance, that good and wholesome law might be entirely eluded : so that taking the *memorandum* to be even a present declaration of trust, it is void by the *statute* of 5 & 6 *E. 6.* and consequently the office must be decreed to the defendant, to hold and enjoy it in his own right, discharged from any trust.

Mr. *Verney*, Mr. *Fazakerley*, and Mr. *Strange*, argued on the other hand, that Mr. *Burrow* was a mere trustee ; and that the *memorandum* he had signed was a clear and plain declaration of trust. And that a trust might well be annexed to a thing which is neither grantable nor extendible. But if this should be construed to come within the *statute* 5 & 6 *E. 6. cap. 16.* then not only the declaration of trust would be void, but likewise the grant itself to the defendant. But this office might well be granted in trust, notwithstanding the *statute* ; for, that only avoids corrupt agreements between the grantor and grantee of an office ; and cannot be construed to extend to such as come in nomination only to execute the office without having any thing to do with the profits of it, but only to such as are themselves the beneficial officers. Here is no corrupt agreement between the grantor and grantee ; but a grant of this office obtained at the sole charge of Mr. *Bellamy*, and no consideration at all moving from the defendant.— That though an office was not, strictly speaking, legal assets ; yet if an officer conveys the profits of an office to trustees for payment of his debts, this court will carry such a trust into execution ; as appears from the case of *Tkynn versus Jacob*, June 16, 1656. where the Lord *Goring* having a grant of the offices of clerk of the council, and clerk of the signet of the court of the president and council of the marches

marches of *Wales*, conveyed the profits to two trustees for the payment of his debts; Mr. *Thynn*, a subsequent creditor, brought his bill against the trustees for an execution of the trust, and to have his debt paid, and so decreed by the then commissioners of the great seal; and upon a re-hearing in 1661, before the Lord *Clarendon*, the decree was affirmed, the validity of the trust being never questioned. The like determination was in the case of *Powell* versus *Drake*, May 10, 1731. in this court; where Mr. *Drake* having a grant of the office of chirographer in the court of *Common Bench*, in the names of *Bennett* and *Champion*, who had declared the trust to be for the benefit of Mr. *Drake*, he devised it for payment of his debts and legacies, and decreed upon the matter's report, that the office should be sold for satisfaction of his creditors; and so it was afterwards for 3500*l*. The arguments, that the profits of the office are not to be severed from the execution of it, are not warranted by any of the cases cited. Sir *George Reynold's* case was adjudged upon the great inconveniency that might ensue upon a grant for years; as if the grantee should die intestate, there would be none to execute it until administration granted; which perhaps might not be for a long time. And indeed if that doctrine was to prevail, it would overthrow all the benefit which the law gives to the grantee of an office, whose grant is to hold it by himself or sufficient deputy; which words are so beneficial and strong, that in *Young* and *Fowler's* case, *Cro. Car.* 555. a grant of the office of register to an infant of eleven years of age, to be executed by him or his deputy, was held good; for that he might appoint a sufficient deputy; which if he did not, or if the deputy misbehaved, it is a forfeiture of the office: and there a difference is taken between such a grant, and where the grant is to the infant alone. Nor can any thing be inferred from the cases cited in *Dyer* 7. 150. but that the public is concerned, that the offices that relate to the administration of justice be

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executed by proper persons ; which does not at all preclude the grantee from making a deputy : for, the office being executed by a sufficient person, the public weal is satisfied. In the case *Culliford and Cardonell, Salk. 466.* a difference was taken between a bond for the payment of a sum in gross for an office, and a bond for accounting for part of the profits as his deputy ; which comes pretty near our case. And that the law will in some cases allow the profits of an office to be severed from the execution of it, appears from the common case of sequestration of the profits of a benefice for payment of debts, where the benefice (*viz.* the cure of souls) is as much an office as that now in question.

(107)

Lord Chancellor. The first question is, Whether Mr. *Burrow* is to be looked upon but as a trustee for Mr. *Bellamy's* creditors, or whether he is to hold this office in his own right, discharged from any trust ? It must be considered, that at the time of this grant Mr. *Bellamy* was himself in the office for his own life, and also for the life of another who surrendered, in whose stead a grant was obtained to Mr. *Burrow* for his life ; upon which he gives such a paper as I think amounts to a declaration of trust : it has been said, that this related to a future act, and was not intended as a present declaration ; but I cannot think so : it seems to be quite proper for a declaration in present. There is an express promise, which would not perhaps have been so strong, if at that time the grant had been actually passed and perfected ; but it was not so at this time : and therefore the transaction was sufficient as things stood. Nor can I think it right to admit of Mr. *Strutt's* evidence to oust a construction which appears from the nature of the transaction itself. The intent must be collected from the words of the note, and from the circumstances appearing at the time of the note given. The not mentioning any thing of it in his will might be to leave the defendant at liberty to execute this office either by himself
or

or deputy; or for many other reasons, as well as those that are insisted on. And by the instructions given to *Strutt*, he had ordered his executors to insure this office for 2000*l.* so that if these instructions were admitted to weigh any thing, they would rather weigh against the defendant than in his favour.

The next question is, whether by law there can be a trust of this office, if this case be within the statute of 5 & 6 *Ed. 6*? I should do Mr. *Burrow* but little service in decreeing for him, if it be within the *statute*. In that case the whole is void, and the office vacant; the *statute* disabling the party buying, as well as selling: so that it would lead us farther perhaps than the defendant desires. The design of the *statute* was to restrain corrupt agreements between the grantor and grantee; but here is no such thing; this being a gratuitous grant from the crown of this office, without any consideration at all, either from Mr. *Bellamy* or Mr. *Burrow*; here is a bare nomination of Mr. *Burrow* to act, but nothing at all to bring it within the *statute*, for want of a corrupt agreement between the trustee and the *cestui que trust*. Indeed the reason of the thing speaks itself; for, where the officer is to have no part of the profits to his own use, but barely his name made use of, what inducement can he have to give a sum of money for an office, the profits of which he is to be no way benefited by? The cases that have been cited for the defendant do not come up to the present case; for, here can be no want of an office nor of a proper officer; he being officer still, though not to his own use: so that this differs widely from the reasons in Sir *George Reynold's* case and the other cases. As I am therefore persuaded that here was a trust intended, I think it ought to be carried into execution. It has been objected by the defendant's counsel, that it was merely executory; but I do not think it more so than any other trust: every trust is, in some sort, executory; for,

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(108)

they all relate to some future act to be done; and this does no more: and whatever may hereafter happen in case a deputy be made, and that he misbehave, the loss must be borne by the trust estate; and consequently no damage to Mr. *Burrow*, who is but a nominal officer only.

And so reversed the decree; but ordered, that after the account settled, the master should make a very liberal allowance to Mr. *Burrow* for the time he had actually executed the office, and also for the time to come.

(109)

Gifford versus Manley.

Case 18.

21 June.

A. and *B.* are trustees under a deed, by which neither of them is to answer for the other.

A. receives a sum of money under the trust, and gives a writing under hand and seal, acknowledging it, and that *B.* had received no part of it; *A.* never placed out the money, and dies; this writing is a specialty and good against the executor, but

not against the heir of *A.* he not being mentioned in it.

BY articles previous to the marriage of *Anthony Gifford*, dated the 20th of *September* 1717. the sum of 400 *l.* was vested in two trustees, *Buckingham* and *Jones*, to be put out at interest; the interest to be paid to the husband and wife during their lives, and the life of the survivor of them; and after their deaths, then to such children of the marriage as should be appointed by the survivor, and in such share and proportion as should be appointed; and it was farther agreed, that neither of the trustees should be answerable for the act of the other. The 400 *l.* was paid to *Buckingham* only, who gave a receipt for it, and, by writing under his hand and seal, dated *October* 1, 1717. declared, That *Jones*, the other trustee, had received no part of the 400 *l.* but that he had received the whole. *Buckingham* dies intestate, having never placed out the 400 *l.* according to the trust, but having kept it in his hands till his death. The question was, Whether this was to be looked upon as a simple contract debt only, or whether as a specialty debt, being under hand and seal?

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The *Master of the Rolls* had decreed it a specialty debt, to affect the executor only, but not the heir, he not being bound, nor the declaration under hand and seal extending to him; and that the plaintiffs should stand in the room of such other creditors as had been satisfied out of the personal estate, in case of deficiency.

It was now insisted on, that an acknowledgement, though without the words *teneri & firmiter obligari*, if under hand and seal, will create a specialty debt, because under hand and seal. (a) And to prove it were cited *Dy. 20. a. Ro. Ab. 597. Bro. Dette, 187. Cro. Eliz. 644.*

Lord Chancellor. This without doubt is to be considered (a) as a specialty debt; there being no other definition of such a debt but that it is under seal: the cases which have been cited prove it. There was one tried at *York*, before the Lord *Macclesfield*, where a man had given a note to a woman upon a consideration not proper to be mentioned, in the following manner, viz. *Borrowed and received* ^{2 Will. 434.} *from — 100l. which I promise never to pay*, and he directed the jury to find for the plaintiff. (110)

Here is a contract that the trustees shall lay out this 400*l.* and that one shall not be answerable for the other; and as *Buckingham* has by a paper under hand and seal acknowledged that he received that estate, he is become answerable for the whole: and not having laid it out as he was bound to do, he has broke his covenant. I have no doubt but that this is a specialty debt: for, though breaches of trust are indeed in some cases considered but as simple contract debts; yet (b) here it must be otherwise, by

(a) 2 *Blackst. Com.* 465. *Benson v. Benson*, 1 *P. Will.* 131. *Degg v. Degg*, 2 *P. Will.* 414.

(b) *Vernon v. Vawdry*, 2 *Atk.* 119. *Strut v. Mellish*, *ibid.* 612.

reason of the express acknowledgement under hand and seal, that he alone has received the whole money, and had received it as trustee for the particular purposes mentioned.

And so affirmed the decree. (c)

Case 19.

2 July.

The testator devises, as to all his worldly estate, that his debts be paid within a year after his decease; and then devises his real estate to trustees for a term in trust for his wife for life, remainder to his sons successively in tail male; and gives several legacies. The real estate is chargeable with the debts in case the personal do not suffice.

Hatton versus Nichol.

MR. *Nichol* made his will in the following words: “(d) And as to the worldly estate, with which it hath pleased God in his abundant goodness to bless me, I give, devise and dispose thereof as followeth; *Imprimis*, I will that the charges of my funeral, and all debts which shall be owing by me at the time of my death, be justly paid and satisfied; especially that due to my *poor carriers, which I will shall be discharged out of the first money of mine that shall be received, of which I desire particular care may be taken; and I will that all my debts be discharged within one year after my decease, or so soon after as can possibly be performed.” And then devises his real estate to trustees, in trust for his wife for the term of 99 years, if she so long live, and after her death in trust for his brother for 99 years, remainder to his first and other sons in tail male, and gives away several specific and pecuniary legacies. The question was, whether his real estate was, by these words, chargeable with the payment of his debts in the case of a deficiency of the personal estate?

(* 111)

Mr. *Solicitor General* argued it to be a plain charge upon the real, as well as the personal estate; which appeared from the provision, that they should be paid within one year; and cited the case of the *Earl of Warrington versus Leigh*, where the real estate was held to be chargeable, though the words were not so strong as in the present case.

(c) *Reg. Lib.* 1734. fol. 383.

(d) In the Register Book the testator is not stated to express himself so; but he merely directs all his debts to be discharged within one year after his decease.

Lord

Lord Chancellor. The debts are well charged (e) upon the real estate, in case of a deficiency of the personal estate: let an account be taken of the testator's debts, and also of his personal estate, not specifically devised, which is first to be applied as far as it will go. (f)

Proof versus Hines.

Case 20.
3 July.

THE plaintiff being intitled, in right of his wife, to some part of the late Sir *Thomas Coleby's* estate, and being a very mean illiterate person, and in very poor circumstances, applied to the defendant, (a brazier by trade,) and his wife to assist him in making out his pedigree, and getting such proofs as were necessary to the making* out his title to this estate; the defendant telling him, That such things could not be done without money; and he answering, That he had none, nor did not know where to raise any without the defendant's assistance, desired him to advance it, and he would repay him: The defendant accordingly laid out several sums; and the defendant's wife employed several persons to search registers, &c. for the plaintiff; pending the suit the defendant's wife often declared, That she thought herself and her husband intitled to a good gratuity for their trouble and assistance of the

The plaintiff, a poor man, suing for a considerable estate, gives a bond for a great sum of money to the defendant, a person who assisted him with small sums, and took some pains in the affair; the defendant's wife had also intermeddled with her husband's knowledge and approbation; and the bond was obtained by pressing the plaintiff for payment of what was expended, and taking advantage of his insolvency. The bond decreed to stand only as a security for what was advanced and interest; and the defendant left at liberty to bring his *quantum meruit* for pains, &c.

(e) *Reg. Lib. A. 1734. fol. 574.*

(* 112)

(f) *Vide Newman v. Johnson, 1 Vern. 45. Beachcroft v. Beachcroft, 2 Vern. 690. Trot v. Vernon, 2 Vern. 708. Prec. in Chanc. 430. S. C. Bowdler v. Smith, Prec. in Chanc. 264. 2 Eq. Caf. Abr. 371, c. 14, 504, c. 43, S. C. Lumley v. May, Prec. in Chancery, 37. Harris v. Ingledew, 3 P. Will. 91. Davis v. Gardiner, 2 P. Will. 190. Leigh v. Earl of Harrington, 4 Bro. P. C. 90. King v. King, 3 P. Will. 358. Earl of Godolphin v. Penneck, 2 Ves. 271. Ellison v. Airey, ibid. 569. Huxtap v. Brooman, 2 Bro. Cha. Rep. 437.*

plaintiff; but was resolved not to trust to the plaintiff's generosity, but to bind him as fast as pen and ink could bind him. The plaintiff coming some time after to the defendant's wife, desired her to continue her and her husband's care for his affairs; she thereupon pressed him very much for the payment of what money had been laid out by them; whereupon he offered to give a bond for 1000 *l.* payable to the defendant in a year, for what services they had already done, and for such care as they would hereafter take of his affairs; to which the defendant's wife replied, he might take what time he pleased for payment of the bond, but pressed him very hard for repayment of what had been laid out by her husband and her: the plaintiff gave her his bond for 1000 *l.* for the use of the defendant her husband after the recovery of some part of the estate by the plaintiff; this bond was put in suit, and now the plaintiff brought his bill to have it set aside as unduly and unconscionably obtained, by taking advantage of the distress he was then under.

It was in proof in the cause, that at the time he gave this bond he was in the meanest circumstances, being reduced so low as to live upon what broken scraps of meat he could get from taverns and such places.

(113) Mr. Verney, Mr. Fazakerley, and Mr. Mills argued for the plaintiff, that he appearing to be illiterate, and in such mean indigent circumstances, must naturally be supposed in the defendant's power; and that the necessity of his circumstances was the cause of giving the defendant a bond for such an exorbitant sum. It can never be imagined that being *sui juris* he would have entered into a bond by which the defendant had it in his power to throw him into gaol, and keep him there all his life, whether he had the good fortune to recover what he was then suing for or not. And it can as little be thought that this bond was designed as a mere gratuity to the defendant, the plaintiff being at that time not worth. 5 *l.*
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in the world, and it being very uncertain whether he should ever be in better circumstances than he then was. Bonds taken from young heirs, marriage-brochage bonds, though given quite voluntarily, and often too chearfully, are set aside in this court upon the reason that the party is not a free agent, and that the free operation of the mind, which is necessary to give validity to every act, is wanting. This appears from the case of *Curwen* versus *Millner*, June 19, 1731. and from 2 *Vern.* 14, 27, 121. and the case of *Twissleton* and *Griffith* heard before the Lord *Cowper*, 1716. These cases indeed were upon contracts; where it may be said nothing was intended by way of gratuity: But there are cases where bonds merely voluntary, and not founded upon contracts, have been set aside as being unconscionable. 1 *Vern.* 413. 1 *Salk.* 158. 2 *Vern.* 652, 764. In most of these cases there was a hazard run by the defendant, the whole money must have been lost upon a contingency; but here the defendant runs no hazard, nor can he have any other loss than that of his advice. The case of *Bosanquett* (g) versus *Dashwood*, Nov. 11, 1734. is another very strong authority, that where advantage is taken of either party's circumstances and necessities, this court will relieve. Nor will the consideration's moving partly from the wife, vary the case; for, her declaring that she would not trust the plaintiff's generosity, but would bind him as fast as pen and ink could bind him, and the husband's afterwards accepting the bond, makes it to be his own act *ab initio*.

Mr. *Attorney General* and Mr. *Solicitor General* argued for the defendant, that there were many cases where the court perhaps would not decree a performance of the condition of a bond; but yet upon application made by the obligor would not set it aside. That this case was very different from the cases of bonds given by young heirs, or for marriage brochage, where the whole rests upon contracts, but no-

(114)

(g) *Ante* 38.

thing is intended by the way of gratuity; as it is in the present case. The illegality of the consideration, fraud, accident, will intitle to relief here; but it was never yet said, that a man's poverty, barely and merely without any other ingredient, would be a sufficient cause for setting aside any voluntary contract he may have entered into through his own carelessness, and which the other party may (through want of christianity perhaps) enforce a performance of.

Here the past services done to the plaintiff by the defendant, and expectation of future services, were the motives upon which the plaintiff gave this bond: and none of the cases cited will warrant the setting aside a bond merely voluntary as this is. The plaintiff cannot be said to be other than a free agent, only because he had a great mind to recover the part of the estate which he apprehended to be his due; which was the only influence he was under at the time he entered into this bond. The case of *Bosanquet* versus *Dashwood* (though one of the reasons for the decree was the unfair advantage that one party had taken of the other's necessity) was very different from this; for, though the statute does not go so far as to make the party receiving the usurious interest liable to refund, yet having prohibited the taking beyond such a sum, and avoided the contract, the taking it is a breach of the statute, and the actual receipt of the money will (in a court of equity) make him liable to refund; the wrong being the same, whether the usurious interest has been actually paid or not. In the present case it is observable, that the bond was never put in suit, nor payment of it demanded until after the plaintiff's recovery of what he was suing for; which takes off the objection, that he might have lain in prison all his life, whether he had prevailed in his suit or not.

Lord Chancellor. I have been a good deal doubtful in this case: for, as on the one hand it is intirely
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reasonable to leave people at liberty to dispose of their property as they think fit; so on the other hand, it is as reasonable to prevent any imposition in such disposal: and if here has been no imposition on the plaintiff, and that all his defence be his poverty, or the inconveniency it may be to him to pay this sum, that will not be a ground for relief. But as this case is circumstanced, the plaintiff's poverty is not to be omitted in the consideration of the transaction. His circumstances were as mean as can be imagined, and no certainty that he should be ever able to discharge any part of this bond; and yet he gives an obligation for 1000 *l.* to be paid, at all events, within the year. A poor illiterate man, who applies to the defendant and his wife for aid in pursuing his claim; they answer, that registers could not be searched, nor other things done without money: he thereupon replies, that he has none, but desires the defendant to lay it down for him. The cause goes on, and pending this suit, the defendant's wife presses for the money laid out; whereupon the plaintiff declares, that for the services they have done, and he hoped they would continue, he would give a bond; upon which the wife replies, he might take what time he pleased for the payment of the bond; but at the same time again presses for repayment of the money laid out by her husband and her, and then the bond is given. So that here is a plain contract between them: and how can I consider it as a gratuity, or otherwise than as a contract? Now though a mere voluntary contract is not to be set aside purely and simply because it is voluntary; yet that differs widely from the present case; which was not intended as a bounty, but as an execution of an original contract for the services already done. Had an attorney, pending the suit, taken such a bond as this upon the same transaction, would not the court set it aside? or would it suffer it to stand any farther than as a security for what was justly and legally due? The rule, *That a mischief is rather to be suffered than a general inconvenience*, does not at all affect this case; for,

(116)

for, it would be a much greater inconvenience to leave men under difficulties and distresses open to all the oppression that other people may please to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs, (b) and marriage-brocage bonds; and will not suffer any advantage to be taken of the extravagance and want of judgment, in the one case, and of the strong bias to obtain what is desired in the other. The only difficulty that arose with me was, whether the defendant had any share himself in the transaction? and that where fraud is pretended it must be fully proved. Here indeed the husband was not present when the bond was executed; but still, I think, there is sufficient ground for relief: for, here the wife was party to all the transactions in searching registers, &c. The contract for the bond was for their joint service; and though she did not press for the bond, yet she pressed for what worked more strongly, viz. the repayment of the money which she and her husband had laid out at the time that he was not worth a shilling, and in the midst of the pursuit of his cause: and when this comes to be coupled with that other saying of her's, *That she would not trust to his generosity, but bind him as fast as pen, ink and paper*

(b) *Waller v. Dalt*, 1 Chanc. Caf. 276. *Barny v. Beak*, 2 Cha. Caf. 136. *Barny v. Pitt*, 2 Vern. 14. *Nott v. Hill*, 1 Vern. 167. *Knott v. Johnson*, 2 Vern. 27. *Wiseman v. Beake*, 2 Vern. 121. *James v. Oades*, 2 Vern. 402. *Earl of Ardglass v. Muschamp*, 1 Vern. 237. *Bill v. Price*, 1 Vern. 467. *Lamplugh v. Smith*, 2 Vern. 77. *Curwen v. Milner*, 3 P. Will. 292, in notes (c). *Twistleton v. Griffith*, 1 P. Will. 310. *Earl of Chesterfield v. Jansen*, 1 Atk. 342, 351, and 2 Ves. 144, 155, S. C. *Barnardiston v. Lingood*, 2 Atk. 133. *Sir Will. Stanhope v. Cope*, 2 Atk. 231. *Gwyne v. Heaton*, 1 Bro. Cha. Rep. 1. *Heathcote v. Paignon*, 2 Bro. Cha. Rep. 167. are cases in which this court has relieved against unconscionable bargains, and cancelled improvident contracts entered into by young heirs.

See addenda * 295

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could bind him, it makes it plain that it was obtained of the plaintiff when under force and necessity; the pressing for the repayment being almost as strong as if she had actually required the bond.

And so decreed the bond to stand as a security only for so much as had been actually laid out with interest; and left the defendant at liberty to bring his *quantum meruit* at law for what he deserved for his pains and trouble. (i)

(117)

King versus Withers. (k)

Case 21.

CHARLES Withers, the testator, being possessed of a considerable real and personal estate, disposed of it in the following words, viz. "I give and bequeath unto my daughter Mary, at her age of twenty-one, or day of marriage, which shall first happen, the sum of 2500 l. And my will and meaning is, that if my son Charles should die without issue male of his body then living, or which may afterwards be born, that then my said daughter should have and receive at her age of twenty-one, or day of marriage, which shall first happen, the farther sum of 3500 l. and if the son's so dying do not happen before the age of twenty-one, or marriage of M, then she is to receive it whenever it may after happen. Then devises his real estate to C. his son in tail male, remainder to his brother in fee: and declares his will to be, that his lands devised be liable to that payment whenever it becomes due; and directs, that in case of failure of issue of C. M. her heirs and assigns, shall join in a surrender of some copyholds to the use of his brother: otherwise the legacy of 3500 l. to be void. The father dies; the daughter marries, having attained twenty-one, and dies in C.'s lifetime; her husband administers to her; C. dies *sans* issue male. The 3500 l. shall not sink in the land, but shall be raised for the benefit of the administrator of M. if the personal estate be deficient. (l)

A. devises to his daughter M. 2500 l. at the age of twenty-one, or marriage; and if his son C. die without issue male, then M. to have at twenty-one or marriage, the farther sum

(i) Reg. Lib. 1734. fol. 289.
414. S. C.

(k) 3 P. Will.

(l) Reg. Lib. 1734. fol. 565.

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“ over and above the said sum of 2500 *l.* but in
 “ case the contingency of my said son’s dying may
 “ not happen before the said age of my daughter,
 “ or her day of marriage, that then she shall re-
 “ ceive and be paid the sum of 3500 *l.* whenever it
 “ might after happen.” Then he devises his real
 estate to his son in tail; and for want of such issue,
 remainder to his brother in fee; then goes on thus:
 “ And my will and meaning is, that the lands and
 “ premisses hereby devised shall be liable to, and
 “ chargeable with the payment of the said sum of
 “ 3500 *l.* whenever it shall become due and pay-
 “ able;” and directs that in case of failure of issue
 of his son, his daughter, her heirs or assigns, should
 join in a surrender of some copyhold lands to the
 use of his brother, otherwise the legacy of 3500 *l.*
 to be void.

(118) The daughter marries, having attained her age
 of twenty-one, and dies in her brother’s life-time,
 leaving the plaintiff, her husband, who took out
 administration to her, and then her brother dies
 without issue male.

The question was, whether the legacy of 3500 *l.*
 should be raised out of the land, the personal estate
 being deficient? and whether it was such an interest
 in her as would go to the plaintiff her administrator?

Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Fazakerley* argued for the defendant, that the case was
 become quite different by the daughter’s death from
 what it would have been had she lived: in which
 case it might have been a consideration of mar-
 riage, and an advancement to her: that the husband
 was a mere stranger; and the same arguments that
 might be used for him, could, with as much rea-
 son, be used for the most remote collateral relation
 she might have left behind her: that had this sum
 of 3500 *l.* been intended to vest absolutely, there
 would have been no necessity for providing for the
 contingency of her marriage, or attaining her age
 of

of twenty-one before her brother's death; but if it did not vest absolutely, then this provision shews, that the testator thought it necessary to provide for that only; and when another contingency happens, no way provided for by him, it must follow, that the plaintiff is not intitled to have this legacy raised; that this was not to be compared to cases where a present interest subsisting is given to one for life, remainder to another upon a contingency; there the interest is subsisting in the donor himself, but not so here: for, it was never a subsisting interest even in the donor himself; and that there was a great difference where, at the time of the legatee's death it is absolutely uncertain whether the contingency will ever happen, as in the present case, and where the thing is certain, but only the manner or time of payment uncertain; that in the last case the legatee's death will not alter the case, but the representative shall be intitled to it; but otherwise in the former, according to *Domat, lib. 4. tit. 2. §. 9. p. 10, 11.* That this case differed from that of *Cave versus Cave, 2 Vern. 508.* for, there the son being, by his father's will, intitled to the interest, was decreed the principal. In the case of the Earl of *Rivers* versus Earl of *Darby, 2 Vern. 72.* the contingency had actually happened by the Lord *Colchester's* having a daughter at his death, and consequently the portion was to be raised for the benefit of her representative. That of *Pinbury* versus *Elkein, 2 Vern. 758, 766.* was a demand out of a personal estate only; and so not to be compared to the present case, where the real estate is chargeable as well as the personal. Nor can it be resembled to that of *Buckley* versus *Stanlake, Pasch. 1720.* where a man seised of a rectory for lives devised it to his wife for life, and after her decease to his daughter, her heirs and assigns, and if his daughter should happen to die unmarried, then to his wife, and her heirs and assigns, subject to and chargeable with two legacies of 100 *l.* each to two strangers, who died before the daughter; then the daughter died an infant and unmarried; the wife devised it to trustees

(119)

(120)

tees for performance of her husband's will; and upon a bill brought, decreed the legacies of 100*l.* each to the representatives of the two legatees, although they both died before the daughter, upon whose death, without marriage, the estate was devised to the wife, chargeable with their legacies: for, there was a second will, viz. that of the wife, to intitle the legatees and their representatives to the several legacies bequeathed by the husband's will; and upon that circumstance it is most probable the court went in decreeing the legacies. In the case of *Wilson versus Spenser*, January 31, 1732, it was a present bequest, and no contingency, the twelve months being given to the executor to get in the testator's estate, and to pay this legacy; but not at all to create a contingency to arise within the year. There is nothing to warrant the distinction, that where the child marries and dies, the legacy or portion shall be raised for the benefit of her husband; but not where she dies an infant and before marriage. The case of *Carter v. Bletsoe*, 2 Vern. 617. is directly against it: nor is it warranted from that of *Jackson versus Ferrand*, 2 Vern. 424. for, there the 500*l.* was to be raised out of the rents and profits as soon as might be; so that whatever was raised before the daughter came to twenty-one, was then to be separated from the land, and remain as money in the executors' hands; and consequently could never merge for the benefit of the heir, when once separated from the land: and though, as it appears from the decretal order, (which was produced in court) debts came in so fast that the 500*l.* could not be raised so soon as expected, yet the intent was the same, that it should be raised for her, and decreed probably upon that or some other circumstance not mentioned in the book. But besides the authority of *Carter versus Bletsoe*, 2 Vern. 617. the cases of *Smith and Smith*, 2 Vern. 92. and *Tournay and Tournay*, *Precedents in Chan.* 290. are express that the child must live until the time the legacy or portion becomes payable; otherwise it shall sink for the benefit of the heir. *Snell versus Dee*, 2 Salk. 415. It

It was also said, that the words, *which may afterwards be born*, make this to be a legacy to take effect after a general failure of issue, and consequently too remote.

Mr. *Attorney General* replied for the plaintiff, that had this legacy been given to her, her executors and administrators, it would not have made the case any thing better for the representative; for, if by her death the contingency be defeated, then the representative can never have it: but a contingency before it has happened, may well vest in the party, and consequently be transmissible to the representative: as if there be a devise of a lottery ticket to one in case it comes up a prize; the devisee dies before the ticket drawn, then the ticket comes up a prize; shall not the representative have it? Many other cases which might be put prove it likewise. If this interest be compared to a grant of a rent *de novo* to commence at a future day, then it may be released or extinguished: and if so, it is immaterial whether it be assignable or not: and relied upon 2 *Vern.* 348. (m)

Lord

(m) *A.* devises 4000*l.* to his son, to be paid at his age of twenty-five, and interest in the mean time, and he to have a maintenance thereout; and directs the 4000*l.* to be raised out of a trust estate. The son dies at his age of twenty-five: decreed it shall be raised, it being an interest vested in the son; for, although it was not payable until his age of twenty-five, yet it was to carry interest immediately. But the authority of *Cave v. Cave* is denied by Lord *Hardwicke* in *Boycott v. Cotton*, 1 *Atk.* 555. his Lordship saying, "that he had ordered the register to be searched, and as the case was there stated, it was impossible there could be any question in it."

It should, therefore, seem that where interest is given before the time of payment, it is evidence of an intention to vest the legacy, where the fund is merely *personal*, *Stapleton v. Cheeles*, 2 *Vern.* 673. and *Prec. in Chanc.* 318. S. C. *Collins v. Metcalfe*, 1 *Vern.* 462. *Hubert v. Parsons*, 2 *Ves.*

Lord Chancellor. It has been made a question by the defendant's counsel, whether the words, *which may afterwards be born*, do not make this a void bequest, as being too remote? Had it been after a general failure of issue, it would not have been good, because it would then have kept in suspense too long; but now the nature of the thing confines the testator's intent; for, though we should take it in the most general sense, yet the contingency must arise within nine months after the brother's death: so that the objection of its being too long in suspense, is, by this plain and natural sense, intirely removed.

The next and great question is, whether this sum of 3500*l.* be now a subsisting charge upon the real estate? for, the personal estate being deficient, I shall consider it principally as a charge upon the land. Three things were, by the will, necessary to happen to entitle the plaintiff's wife to this legacy; death of her brother without issue male, marriage, or attaining her age of twenty-one; all three have happened: and now the question is, whether another implied contingency be necessary to intitle her to this additional portion. The words, whereby the particular contingency of her marriage, or attaining her age of twenty-one is provided for, have

262. *Lord Teynham v. Webb*, 2 *Ves.* 207. *Van v. Clarke*, 1 *Atk.* 512. *Fonnereau v. Fonnereau*, 3 *Atk.* 645. *Atkins v. Hiccocks*, 1 *Atk.* 501, *Hoath v. Hoath*, 2 *Bro. Cha. Rep.* 3. *secus* where the portion or legacy is charged upon, and is to arise out of lands, for in that case the portion shall sink, and not go to the representatives of the person so dying, and though it were limited to the party generally to be paid or payable at such an age, and whether with, or without interest. *Stapleton v. Cheales*, 2 *Vern.* 672. *Prec. in Chanc.* 318. S. C. *Boycot v. Cotton*, 1 *Atk.* 555. The same rule when the legacy is to arise out of a mixed fund. *Prowse v. Abington*, 1 *Atk.* 482.

been

been construed both ways; but I do not think that any great stress can be laid upon them either one way or the other. The testator might throw it in naturally enough to manifest his intent, that his daughter should have this 3500*l.* although she married or attained her full age before her brother's death: nor will the operation of the words, whereby the real estate is made chargeable, any way affect the present question. The other clause, whereby she or her heirs are to join in a surrender of the copyhold lands, has also been considered as influencing this question; but it does not follow from thence, that what has since happened was then in the testator's view; for, she might have died before she had actually received the money, although the son had died without issue in her life-time; and therefore it was reasonable enough to secure the remainder-man the better, by compelling her heirs and assigns to join, upon pain of forfeiture of this sum: the only thing therefore to be considered is her death, upon which the whole must turn. It has been said, that where portions, in cases of this nature, are chargeable upon land, they shall sink for the benefit of the heir. The leading case is that of *Lady Paulet* versus *Lord Paulet*, 1 *Vern.* 204, 321. (n). This and the like cases have gone not upon any provision of the party, but on the construction of this court; nor has the difference between the age being annexed to the body of the devise itself, or to the time of payment, ever held in these cases: the reason is, that if portions are given to be paid at eighteen, or marriage, and the party dies before that time, the occasion of raising

(122)

(n) A term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage. One of them dies under 21, and unmarried. Her portion shall not be raised for the benefit of the administratrix. And note, this decree was affirmed upon an appeal to the House of Lords.

it, viz. the advancement, ceases; and therefore the reason of giving it shall qualify the grant itself: as an annuity *pro consilio impenso & impendendo*, the counsel is the foundation of the grant: and so in these cases the provision for advancement being the reason of the portion, when that fails, the portion shall cease likewise. It may be compared to what is called in *Scotland*, *causa data & non secuta*, when the cause ceases: it shall never be raised for one purpose when designed for another. Indeed in the case of *Jackson versus Farrand*, 2 Vern. 424. (o) the court went somewhat farther: but the marriage of the child might be the cause of that decree, 500*l.* being intended as a portion, although no express provision made that it should be paid upon the daughter's marriage. The case of *Carter versus Bletsoe* (p) seems to be contrary; and in both these cases there was the same circumstance, viz. the death of the daughter after marriage, but before the

(o) *A.* by will gives 500*l.* to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of the real; and if not raised by that time, the executors to stand seised and take the rents, till the 500*l.* was raised, and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one. The husband takes out administration. Decreed the portion to be raised, and that by a sale, although the land, by reason of the incumbrances, would produce little more than 300*l.* *Prec. in Chanc.* 109. S. C. 1 Bro. *Parl. Caf.* 61. S. C. by which it appears this decree was reversed in part in the House of Lords, as to the sale of the intailed estate, but without prejudice to the general question. But in *Boycott v. Cotton*, 1 Atk. 555. the authority of this case is denied by Lord Hardwicke.

(p) 2 Vern. 617. *A.* devises lands to *B.* his son and his heirs, and declares that out of the lands, he shall pay 200*l.* to his daughter at her age of twenty-one; she marries and dies under age. *Per cur.* There is no vesting clause in the will: the direction, that the son pays to the daughter at her age of twenty-one, vests nothing until she attains twenty-one, and she dying before, it never arises.

only time which was limited for the payment happened. In cases where the portion is to be raised out of the reversionary term after the tenant for life's death, and to be paid at twenty-one or marriage, the child marries, and then dies, it would be very hard to decree it to merge. In *Butler and Duncemb's case*, 2 Vern. 760. (q) a sum was borrowed by the direction of the court to assist the husband in his trade, the term being not yet come into possession. In the case of *Broome versus Berkley*, Abr. Eq. Ca. 340. (r) the Lord Trevor delivered his opinion in the *House of Lords*, that in all such cases as this, where the portion is contingent, and the child marries, and then dies, the representative shall have it. Indeed in cases where the child dies so young that the portion could never be wanted, the court will not decree it to be raised, because there is no occasion for it; as in *Bruen and Bruen's case*, 2 Vern. 439. (s) and in that of *Tournay versus Tournay*; (t) but there is no precedent where the

(123)

(q) 1 P. Will. 448. S. C.

(r) Ante 32.

(s) A term is created by marriage settlement to raise 3000*l.* for daughters' portions within twelve months after the death of the survivor of husband and wife. There being one daughter, the father by his will devises the trust lands to make good his wife's jointure, and to raise 3000*l.* for his daughter's portion. *Per cur.* It being for a portion to be raised out of the land, and the daughter dying when but five years of age, before she had occasion for a portion; although no time was appointed for the payment of it, it shall merge in the land for the benefit of the heir, and not go to her administrator.

(t) *Prec. in Chan.* 291. By marriage settlement a term is created for raising 400*l.* a piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised, held *per cur.* that it should sink in the inheritance, and not be raised for the benefit of its representative.

court has dealt so hardly with a child who dies after marriage, as to take that away which was intended for its provision.

It has been said, that this being future, could not be intended as a provision for her. But is not a future interest an interest still, though not so good as an interest in possession? It is and may be a consideration of marriage. It does not indeed absolutely vest, because the contingency may never arise: but it is carrying it too far to say, that it does not vest at all. Why may it not vest in such manner as to be transmissible? There is no doubt but after twenty-one she might have released it, though not have assigned it at law; because but a mere possibility in the eye of the law. A condition may descend upon the heir, although no estate does actually descend from the ancestor; and when the condition is performed, he shall be in by descent, because of the condition descending. And as this might have been released, I do not see why it should not be transmissible to the representative. But if I had any doubt about that, the several authorities that have been cited for the plaintiff would bind me; and particularly 2 *Vent.* 347. (where the interest was as contingent as it is here) is an express authority that a contingent interest is transmissible to the representative. The case of *Bulkley* versus *Stanlake* is the same. It has been said indeed, that in this case the contingency was annexed, not to the legacy itself, but to the fund only out of which it was to arise: but I apprehend that the contingency went to the whole. Nor can I help considering that case as another authority, that a contingent interest is transmissible to the representative. That of (u) *Pinbury* versus *Elkin* was a devise of 80*l.* to his brother, if his wife should

(124)

(u) 2 *Vern.* 758. 766. S. C. 1 *P. Will.* 563. S. C.

die without issue (x) by the testator then living; the devisee died in the life-time of the wife; then the contingency happened, and the legacy decreed to be paid to the representative. The case of *Snell* versus *Dee*, 2 *Salk.* 415. weighs but little with me; for, first, I do not think it well reported; secondly, the reason seems idle; for, why may not an uncertainty be transmissible as well as a certainty, though perhaps not so beneficial? This, although to be raised out of land, cannot receive a different construction from the other cases: for, though it is to be raised out of land, it remains money still: and can any one say, that the contingency upon which this was left to her, has not happened? Has not she married? And although she has not lived to receive it, yet the contingency having happened, it must go to her husband, who is her representative, and who may well be thought to have married her in contemplation of this additional fortune of 3500*l.* though depending upon a contingency.

And so decreed it to the plaintiff, the husband and administrator of *Mary*.

N. B. Upon the 16th of *March* 1735, this decree was affirmed in the House of Peers. (y)

(x) As to the effect of the words "dying without issue," *vid. Nicholas v. Hooper*, 1 *P. Will.* 198. *Target v. Gaunt*, *ibid.* 565. *Beauclerke v. Dormer*, 2 *Atk.* 313. *Saltern v. Saltern*, 2 *Atk.* 376, *Earl of Stafford v. Buckley*, 2 *Ves.* 181. *Bigge v. Bensley*, 1 *Bro. Cha. Rep.* 190.

(y) With costs, 3 *P. Will.* 418. *S. C. Reg. Lib. A.* 1735. fol. 565. The cases upon this subject are extremely numerous, and difficult to reconcile, *Bond v. Brown*, 2 *Cha. Cas.* 165. *Pawlett v. Pawlett*, 1 *Vern.* 204, 321. *Smith v. Smith*, 2 *Vern.* 92. *Bruen v. Bruen*, 2 *Vern.* 439. *Yates v. Fettiplace*, 2 *Vern.* 416. *Carter v. Beltfoe*, 2 *Vern.* 617. *Tournay v. Tournay*, *Prec.*

in Chanc. 291. *Stapleton v. Cheales*, *Prec. in Chanc.* 318, *Bradley v. Powell*, *post.* 193. *Gordon v. Raynes*, 3 *P. Will.* 134. *Duke of Chandos v. Talbot*, 2 *P. Will.* 613. *Jennings v. Lukes*, 2 *P. Will.* 276. *Hall v. Terry*, 1 *Atk.* 502. *Prowse v. Abington*, 1 *Atk.* 482. *May v. Andrews* (cited in *Dawson v. Kellett*, 1 *Bro. Cha. Rep.* 123.) *Boycott v. Cotton*, 1 *Atk.* 555. *Van v. Clarke*, 1 *Atk.* 512. *Attorney General v. Milner*, 3 *Atk.* 112. are cases in which it was held, that charges upon land, payable at a future day, could not be raised, where the party to be benefited dies before the time of payment, and that, whether the charge is created by deed or will, or provided by way of portion for a child, or given merely as a legacy by collateral relations, or others, and whether with, or without interest. However, there are several cases, which considering the rule as laid down in *Pawlett v. Pawlett*, to be too much strained, have aimed at a modification of it, by adopting in the construction of the rule, the following distinction, viz. "whether the time of payment refers to the circumstances of the person, or of the fund:" where it refers to the circumstances of the person to take, as in the case of a portion, the court has construed a sum so given to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose; so that the purpose failing, the land ought not to be charged: but where a legacy is given out of a particular fund, with a reference to the time when it shall vest in possession, as for instance to *B.* with a charge to *C.* it is a distribution of the fund between the person to take in present, and him who is to take in future, and the gift to *C.* vests immediately. *Butler v. Duncombe*, 1 *P. Will.* 457. *Pitfield's case*, 2 *P. Will.* 513. *Hutchins v. Foy*, *Comyn's Rep.* 716. *Lowther v. Condon*, 2 *Atk.* 127. *Hodgeson v. Rawson*, 1 *Ves.* 44. *Sherman v. Collins*, 3 *Atk.* 319. *Godwin v. Monday*, 1 *Bro. Cha. Rep.* 191. *Thompson v. Dow*, cited *ibid.* 193. *Dawson v. Killett*, 1 *Bro. Cha. Rep.* 119. *Jeal v. Tickener*, cited *ibid.* 120. *Clarke v. Mejs*, *ibid.* 120. *Kemp v. Davy*, *ibid.* 121. *Tunstall v. Brachen*, *ibid.* 124. For the cases where portions have been given out of land, and no time of payment expressed, vide *Earl of Rivers v. Earl of Derby*, 2 *Vern.* 72. *Cowper v. Scott*, 3 *P. Will.* 172. *Brewin v. Brewin*, *Prec. in Chanc.* 195. *Lord Teynham v. Webb*, 2 *Ves.* 209. *Lord Hinchinbroke v. Seymour*, 1 *Bro. Cha. Rep.* 395.

Rudge versus Barker.

Cafe 22.
18 July.

THOMAS Cole made his will as follows, viz. "I give unto my grand-daughters *Elizabeth* and *Anne*, and to my grandson *Thomas* 1000 l. of my capital stock *in the *East India* Company, and the interest thereof to them for their use. And if any dies, to the survivors or survivor share and share alike; and my meaning is, that the interest shall be paid to their father my son *Howard*, to be improved to their use." The grandson died an infant, by which his share survived amongst his two sisters; then one of the sisters dies, and the question was, whether the share she had taken by survivorship upon her brother's death should survive to the other sister, as well as her original legacy of 1000 l. ? or whether that share taken by survivorship should go to the father, who was her administrator ?

A. bequeaths to his grandchildren, *B.* *C.* and *D.* 1000 l. a piece, and the interest thereof to their use; and if any dies, to the survivors or survivor share and share alike; the interest to be paid to their father to be improved to their use; *B.* dies an infant, then

C. dies; the share which *C.* took by the death of *B.* shall not survive to *D.* but go to *E.* the father; who administered to *C.* The interest and principal are to receive the same construction.

(*125)

Master of the Rolls. The first question is, whether the interest shall receive a different construction from the principal? But I think it will not; for, being both coupled together, they must receive the same determination.

The next question is, whether the share arising by survivorship, which the deceased sister took upon her brother's death, will survive to the next sister; or, whether it will go to her father who is her administrator? And I am of opinion that it does not survive, but goes to her administrator. Indeed, it may be, the testator intended the whole to go amongst his grandchildren, and nobody else to have any benefit: but whatever his intent might be, I must judge upon the words of the will; and accord-

(126) cording to those, the limitation over relates to the legacy only. Had they not been distinct legatees, it might have been another question: but being intirely distinct, and not even so much as tenants in common, the case is the same as that of *Bearnes versus Ballard* (z) before the Lord King, June 1, 1727, where it was decreed for the administrator. And agrees with the Lord *Holt's* opinion cited in *Woodward* and *Glasbrook's* case, (a) 2 *Vern.* 388. the devise is several, and the question is not upon the original share, but upon the share that accrued by the survivorship, which goes to the administrator by reason of the words *share and share alike*, which are tantamount to the words *equally to be divided*.

And so decreed (b) the share accruing by survivorship to the father, who was the administrator of the deceased. (c)

(z) There was a devise to four children of 500*l.* a-piece at eighteen or marriage, then to the survivors or survivor of such survivors; one of the children died a minor, and then his share survived to the three remaining children; another afterwards died a minor; and the question was, whether the share which came by survivorship to the last deceased minor, should upon the minor's death survive again, and held it should not.

(a) The testator *E. G.* by his will (*inter alia*) devised several parcels of land to his several children in tail, and if any of them died before twenty, or unmarried, such child's part to go over to the survivor's children. In ejectment before Lord *Holt*, he was of opinion, that *Thomas* dying unmarried, though he attained his age of twenty-one, his moiety went over to the survivors; and *John*, another son likewise dying unmarried, though after twenty-one, that his moiety went over to the survivors; but that what went over to *John*, on the death of his brother *Thomas*, would not go over again a second time.

(b) *Reg. Lib. A.* 1734. fol. 537.

(c) *Vide ex parte West*, in the matter of *Scaife*, a bankrupt, 1 *Bro. Chan. Rep.* 577. from the report of which case it appears as if Lord *Thurlow* did not altogether coincide in opi-

Moor versus Black & al',

Case 23.
26 July.

THE plaintiff by her bill charged, that Mr. *Rawlinson* died upon the 8th of July 1732, seised of several estates, which upon his death descended, as to one moiety, upon the plaintiff's husband in fee; who died the 11th of March after, before any partition made; and that the defendants had got possession of all the title-deeds, whereby she was disabled from suing for dower at law, and therefore came into this court to have her dower assigned of what lands descended to her husband.

A. dies seised of lands, which descend upon *B.* and *C.* in coparcenary: *B.* before receipt of rent, or partition made, dies; his widow brings a bill

to have dower assigned, suggesting that *C.* had all the title-deeds: upon demurrer resolved, that this court will relieve in such case. The demurrer over-ruled.

The defendants demurred, for that the plaintiff's right of dower was a right merely at law, and triable by a jury; and that no impediment was suggested why she could not recover at law.

Mr. *Attorney General* and Mr. *Forrester* insisted for the plaintiff, that she was proper to come into this court, both by reason of the deeds being in the

opinion with Lord *Talbot* in the doctrine established by him in *Rudge v. Barker*; for he seemed to think it a very natural construction, that the word "share" (used by the testator in the last mentioned case) meant all that the party took under the will, which would take in the survived part as well as the original share; and that it struck him forcibly that the whole ought to survive; but as there were cases in point which expressly determined otherwise, he did not care, sitting in bankruptcies, to overturn them in the case before him.

The parties afterwards filed a bill, and the cause was set down before his Honour the *Master of the Rolls*, who decreed that the share did not survive a second time. *Vid.* also *Perkins v. Micklethwaite*, 1 P. Will. 278. *Pain v. Benson*, 3 Atk. 78.

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defendants' hands, (*d*) without which she could not prove her title at law; and also for that the estate being in coparcenary, and no partition made, the sheriff could, upon recovery in a writ of dower, put her into possession but of a third of an undivided moiety; and that still recourse must be had to this Court for a certainty, and to set out a part to her. The judgment in dower not reducing it to more certainty than it was before; according to 1 *Inst. sec. 45.* and that by bringing this bill, the plaintiff had only done at first what she must have done at last.

- (127) Mr. *Fazakerley* insisted on the other hand for the defendant, that though the plaintiff might be intitled to a discovery, yet she could not be so to have dower assigned her; that being a title merely at law, and for a detainer of which, damages were to be assessed by a jury; and that she was not intitled to the possession of the deeds, but that they belonged to the defendant.

The *Lord Chancellor* over-ruled the demurrer upon both points, saying, that there was no possibility for the plaintiff (as appeared to him) to recover without the assistance of the deeds: for, the estate descending upon her husband in *July*, and he dying upon the 11th of *March* after, before any receipt of rent, or partition made, she could not prove a seisin at law to intitle herself to dower.

Secondly, that she lay under another difficulty, as her husband's estate was complicated, and that she must come here for a partition; otherwise the consequence would be, that after judgment and execution, she must, at the end of every six months,

(*d*) For if there should happen to be a mortgage or term of years in her way, she would be defeated at law and liable to costs.

be

be driven to her action against such as held jointly with her, and who received the profits, for her share, and also for her damages for the detainer; which would be absurd and unreasonable. (e)

Hudson versus Hudson.

Case 24.
30th July.

THE plaintiff brought his bill, as administrator, against the defendant; who pleaded, that administration had been granted to the plaintiff and to another who died before the bill brought: and upon that plea the question was, whether, when an administration is granted to two, and one dies, the administration shall cease and be void? or whether it shall survive to the other who is still living?

Administration is granted to two; one of them dies, the administration survives.

The Court doubted at first, and would hear civilians: and accordingly it was now argued by Dr. Strahan for the plaintiff, and by Dr. Lee for the defendant; and he quoted the case of *Bowden* versus *Bowden*, the 30th or 31st of April 1734, where it was adjudged in the *Court of Arches*, that an administration does in such case determine and cease, and does not survive; being but an authority, and no interest.

(128)

Lord Chancellor. There are authorities both ways in the present case, viz. that of *Adams* and *Buckland*, 2 *Vern.* 514. where it was held by the Lord

(e) So *Curtis v. Curtis*, 2 *Bro. Cha. Rep.* 620. which establishes the doctrine, that a widow may in all cases sue for dower in a court of equity.

Cowper, that an administration (*f*) would survive; and that of *Bowden* versus *Bowden*, where the contrary was determined in the Ecclesiastical Court. As therefore the precedents are not uniform, we must consider this case according to the general rules of survivorship; which seem to be pretty much the same both by the common and civil law. If an estate for 99 years be granted to two, if they shall so long live, when one dies the estate is determined; but if a grant be made to two for their lives, when one dies the survivor shall take the whole; according to *Brudenell's* case, 5 Co. 9. but in Auditor *Curle's* case, 11 Co. 1. it is held, that if an office be granted to two, there shall be no survivorship of it without special words. We must now consider which of these cases resembles the present one most. It cannot properly be said that there was any such thing as an administrator before the statute 31 Ed. 3. cap. 11. Before that statute, where one died intestate, the king, as *pater patriæ*, was to take care of his estate; and this did, in process of time, devolve from the king to the ordinary. And the statute of Westm. 2. cap. 19. which was made to compel the ordinary to pay the intestate's debts, looks as if they had not been very forward in it before. But by the 31 Ed. 1. the ordinary is to grant administration: and therefore the administrator is the creature of that statute, and is to be considered accordingly. The express words of the statute enable him to sue and be sued as an executor: and since that time it has never been doubted but that the property of the goods was well vested in him, since he now represents the intestate in every thing. By the wording of the 21 H. 8. cap. 5. one would imagine, that somewhat beneficial is in-

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(*f*) Upon the ground that administration is not a bare authority, but an office; for administrators are enabled to bring actions in their own names, come in the place of executors, and therefore the office survives,

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tended to the administrator, by reason of the persons there mentioned, to whom administration is to be granted, viz. *the most lawful friend*: for, had no benefit been intended to him, why might not the administration be granted to any other as well as to the nearest of kin? The spiritual courts did indeed take bonds of the administrators to oblige them to distribute the estate; but as often as they did so, they were prohibited by the temporal courts. Nor does the *statute* of distributions alter the nature of the office; it makes him only to be as it were a trustee for the persons intitled to a distribution, and usually for himself as one of them; and then if a joint estate at law will survive, why shall not an administration, when they both have a joint estate in it? A trust will survive though no way beneficial to the trustee; and the administrators being appointed by the *statute* to come in lieu of executors, the *statute* has therefore made a will for him who is dead intestate: and the office of administrator is every way to be compared to that of an executor. (g) It has been said indeed, that one executor may do many acts which one administrator cannot do without the other administrator; but that is nothing to the survivorship either for or against it. I have all due regard for the determinations in the Ecclesiastical Court; but have likewise a great deal for those of a noble person who sat here with as much honour as any man ever did: and he having determined this point in *Adams* and *Buckland's* case, I think it safer for me to follow that authority than any other which may have passed in the Ecclesiastical Court *sub silentio*; especially when the question arises upon the construction of several acts of parliament, the construction of which belongs to the temporal courts.

And so over-ruled the plea. (b)

(g) Bacon's Law Tracts, 82. ed. 1741. *Burn's Eccles. Law* 233.

(b) *Reg. Lib. A.* 1735. fol. 468.

Hervey versus Sir Edward Desbouverie and others.

Case 25.

8 August.

By the custom of London, a freeman cannot devise either the orphanage part, or the contingency of the benefit of survivorship, among orphans. Neither can an orphan devise his orphanage part, or the part

which accrued by survivorship. But such freeman may give, by will, to his children, legacies inconsistent with the distribution under the custom; and then such children must make their election, whether they will abide by the will, or by the custom? But they cannot abide by the will in part only, and take the benefit of the custom also.

THIS cause came on by consent, and was thus: Sir Christopher Desbouverie (a freeman of London) being seised of a very considerable real estate, and possessed of a personal estate of the value of 60,000 *l.* by his will dated January 21, 1730, gave to Anne his eldest daughter (now the wife of Mr. Hervey, one of the plaintiffs) the sum of 12000 *l.* and to his daughter Elizabeth (another of the plaintiffs) the sum of 7000 *l.* and to the defendant John Desbouverie, his younger son, 14000 *l.* and devised all the rest and residue of his personal estate to his executors, in trust for his eldest son, Freeman Desbouverie, until he should attain his age of twenty-one; and in case his eldest son should die before that age, he gave all the residue to the defendant John.

By a codicil dated July 17, 1732, he gave his daughter Elizabeth 3000 *l.* more (which made her fortune 10,000 *l.*) and thereby taking notice that his daughter Anne had been some time married to Mr. Hervey, instead of 12,000 *l.* he gave her but 10,000 *l.* and desired that Mr. Hervey should immediately, upon his decease, give the rest of his executors (Mr. Hervey himself being one) a bond, renouncing all farther claims and demands of and from his estate. The testator died soon after; leaving no wife, and only the four children above named. About two years after Mr. Freeman Desbouverie died at the age of eighteen, having made his will; whereby, after some pecuniary legacies given, he made his brother John residuary legatee.

The

The plaintiff's bill was, to be let into a share of *Freeman's* orphanage part, as distributable amongst the surviving children by the custom, *Freeman* dying before twenty-one, who could neither devise his orphanage share before that age, nor could his father devise it, upon the contingency of his dying before twenty-one, to one child in bar of the rest; the custom being paramount to the will, and not to be controlled by it.

Mr. *Attorney General*, Mr. *Fazakerley*, Mr. *Moreton*, and Mr. *Forrester*, argued for the plaintiffs, that according to the custom nothing stood in the way of the plaintiff's claim; for, that the orphan himself could not devise his share, nor could the father devise it over upon the contingency of his son's dying before twenty-one; according to *Pate* and *Hatton's* case, 1 *Chan. Cases*, 199. and that of *Wilcox* versus *Wilcox*, 2 *Vern.* 558. (i) and according to the constant course of the city; which appeared from the following precedents taken out of the city books, viz. *Saturday*, — *April* 1570. "This day it was put in question, whether *William Offley*, merchant, who married *Anne* the daughter of *William Beswick* of London, draper, and was advanced in the life of the said *William* her father, should, or justly ought to have part or portion of the orphanage share of *Arthur Beswick*, one of the orphans of the said *William Beswick*, which *Arthur* is deceased, amongst other the orphans of the said *William*, after the decease of the said *Arthur*, or not? Whereupon the ancient and old records were seen and considered; and for that it appeared, by the ancient custom of this city, that the said *William Offley*, in the right of the said *Anne* his wife, ought to

(i) So *Jesson* v. *Effington*, *Prec. in Chanc.* 207. *Vid.* also *Pusey* v. *Desbouverie*, 3 *P. Will.* 318. note (2). *Loeffes* v. *Lewen & al.* *Prec. in Chanc.* 372. 7 *Vin. Abr.* 213. pl. 3. *Fouke* v. *Lewen*, 1 *Vern.* 88.

“ have, amongst other the orphans and children of
 “ the said *William Beswick*, his part of the orphan-
 “ age and portion of the said *Arthur* after his de-
 “ cease; it was ordered, that the surety's bond for
 “ the said orphan shall be sent to for the payment of
 “ the same to the said *William Offley*.”

(132) *Note*; the custom was, that if the orphanage shares were not brought into the chamber of *London*, securities were given for the payment.

“ Another to the same purpose, *Friday, June 20,*
 1572.

“ *Cur. Specialis Tent. die 24^o Maij 1625.*

“ According to the order of this honourable court
 “ of the 10th of this instant *May*, we have sundry
 “ times met together, and considered of the matters
 “ thereby referred to us; and upon examination,
 “ perusal and consideration had of ancient and la-
 “ ter books and records of this city, we find that
 “ the custom is, and so hath been taken, declared
 “ and adjudged by the court, that the orphanage
 “ part and portion of an orphan of this city, dying
 “ in his or her minority, within the age of twenty-
 “ one years, whether son or daughter (if such or-
 “ phan daughter, so deceasing, be unmarried at
 “ the time of his or her decease) by the custom of
 “ this city ought to come and be to and amongst his
 “ or her brethren or sisters by the father surviving,
 “ *as well advanced as not advanced* in the life of the
 “ father; although the father of such orphan, by
 “ his last will, should otherwise dispose of the
 “ same, or should die without a will. This 24th
 “ day of *May 1625.* *Heneage Finch* recorder, *Tho-*
 “ *mas Middleton, Edward Barkham, &c.* And upon
 “ the certificate a judgment given.”

“ Another

“ Another judgment of the same nature, *February*
“ 28, 1672. 25 *Ch.* 2. and the same certificate to
“ the Court of *Chancery*, *February* 18, 1702. 1 *Ann.*
“ in *Jesson* and *Essington's* case, *Precedents in Chan-*
“ *cery*, 207.”

“ *Martis* 8^o *Octobris* 1639.”

“ Whereas in the cause, at the suit of *George Combe*
“ and *Anne* his wife, one of the daughters of *Walter*
“ *Burton* deceased, late citizen and freeman of *Lon-*
“ *don*, complainant against *John Burton* and others, (133)
“ depending in the court of requests, the said court
“ finding the question to depend upon the custom
“ of this city, whether thereby any orphan of this
“ city, under age, may by will devise his orphanage
“ part or not? or, whether the same ought not to
“ be distributed amongst the rest of the orphans,
“ notwithstanding the devise by will? did think fit
“ that the plaintiff's counsel make their case con-
“ cerning the said point, and that Mr. *Recorder* and
“ Mr. *Common Serjeant* shall be attended therewith;
“ and that after consideration had, to certify the
“ aforefaid court the custom of this city in the said
“ point: now this day the case was presented unto
“ this court under the hand of counsel on both
“ sides; and upon advice and counsel taken there-
“ upon by this court, it was agreed and ordered by
“ this court, that Mr. *Recorder* certify according to
“ the truth and custom of this city, that an orphan,
“ before his full age of twenty-one years, cannot by
“ will devise his orphanage part; but that the same
“ ought to be distributed amongst the rest of the
“ surviving orphans, according to the laudable cus-
“ tom always approved of.”

A certificate of the same purport to the Court of
Chancery, *January* 17, 1655.

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The plaintiff's counsel insisted, that by these precedents it plainly appeared, that neither the father nor the orphan (during his minority) could make any disposition of the orphanage share in bar of the right of the surviving orphans; and that being established, nothing could bar the plaintiffs in the present case but the pretended satisfaction given by the father's will for their several orphanage shares; which although indeed not so considerable as the legacies left by the will, yet these legacies could never be taken as a satisfaction for this contingency; but as to the 2500*l.* devised to each above their orphanage share, must be taken as a mere bounty from the testator. That this case differed from that of *Kitson* versus *Kitson*, (*k*) *Mich.* 1712. *Precedents in Chan.* 351. and *Eq. Cases*, 28. where the wife was obliged to take either by the will or the custom; for, that upon the husband's death there was a present right vested immediately in the wife, which the will (if she chose standing to that) should be a satisfaction for; but here was no right in the plaintiffs, upon the father's death, to any thing but their own orphanage shares. This was a mere contingency to arise, not out of their father's, but out of their brother's estate, and is to be considered only in that light; that the cases upon satisfaction are generally between debtor and creditor; as is held in *Leckmere* and *Lady Leckmere's* case; (*l*) but here was neither debtor nor creditor, but a mere chance which the custom gives to every child of a freeman to take his brother's or his sister's share if dying under age; and consequently the rules of satisfaction did not reach this case. That had Sir *Christopher Desbouverie* advanced the plaintiffs in his life-time, it would never have barred them from this right of survivorship; as was clear from the above precedents: and if so, it was hard to take it from them,

(*k*) *Vid.* also 1 *P. Will.* 533. S. C.

(*l*) *Ante* 80.

because the advancement was by will, and not by act executed in the father's life-time.

Mr. *Solicitor General* insisted for the defendants, that the testator's intent was manifest, that the plaintiffs should have no more than 10,000 *l.* each; and that he had this very contingency in view which has happened: so that the question is, whether the will shall be complied with, or whether the plaintiffs shall be at liberty to drop that which makes against them, and take up that which makes for them, relying upon the operation of the custom? The defendants do not pretend that the father had power to devise the orphanage share, that is, the share of any of the children that should die before twenty-one, in bar of the custom; but what they insist upon is, that if the plaintiffs will take advantage of the additional bequest beyond the orphanage share, they must comply in the whole with the will, and not comply with one part and waive the other. The objection that this was a future contingent right, and therefore not within the will, cannot alter the case; for, although it was but a contingency at the time of the testator's death, yet the release of that contingency might as well be the consideration of this additional bequest, as if it had been a present right immediately upon Sir *Christopher's* death.

(135)

Lord Chancellor. The question here arises upon the will compared with the custom. It is clear that the testator intended by his will to make a disposition of his personal estate: he has given his daughter *Elizabeth* 3000 *l.* in case his son *Freeman* should die before twenty-one; and by the codicil gives some additional legacies to his children; but makes no alteration, as to the devise over to his son *John*, the eldest son dying before twenty-one. Had this stood upon the custom alone, there must have been a distribution of his orphanage share: but now it is to be considered, whether the custom shall prevail against the express limitations of the will? The

(136)

custom is clear that children advanced, as well as those who are not advanced, are intitled to a distribution: and the reason is, that when the father advances his child in his life-time, it is supposed to be done with regard to his present circumstances; and if it do not appear how much he was advanced with it, it is a bar; otherwise, if the *quantum* appear; for, the father shall not have it in his power to advance one more than the other upon a presumption that the other may be more fully provided for by the death of a third; and therefore it is very reasonable that a child advanced, as well as one not advanced, shall be intitled to a share upon the death of a brother or sister. It is clear therefore that neither the freeman nor the orphan can devise against the custom; nor can they any more devise what accrued by survivorship than the original share; but still the father may make a disposition by his will, and leave it to his children's option, either to take by the will or stand by the custom. If they choose the former, that will be a waiver of the custom; for, it would be unreasonable to admit a latitude of taking by the will, as far as that makes for the party, and likewise by the custom, as far as that will go, and waive the other part of the will which makes against him. The case of *Noys versus Mordaunt*, 2 *Vern.* 581. goes upon that reason: and the city precedents prove only, that the father cannot by will dispose of the orphanage share in bar of the custom; but do not prove, that where a will is made, and legacies given by that will, which the child accepts of, that he shall notwithstanding have recourse to the custom for his share; and so, by taking both under the will and the custom, defeat that provision intended by his father for others. The bond that the plaintiff was to give, is to me a strong proof that the testator had the custom in view, and intended notwithstanding to make this provision for his children; for, it does not appear that either the plaintiff, Mr. *Hervey* or his wife had any other claim or right to any part of the testator's estate but what the custom of *London* gave

gave them: nor can I ever think that this contingency will give them a right to take both by the will and the custom: for, even supposing it to be the orphan's estate, it is clear that the testator considered it as his own; and in that view, and upon that consideration, gave the plaintiffs the additional sum of 35,00*l.* beyond what was due to them by the custom. And indeed, in propriety of speech, the orphanage shares are so many demands upon his estate; so that his expression is not so improper as may be thought. But however, his intent is clear; and that must take place, although his expressions be not so correct as might be; and 10,000*l.* being better than 7,500*l.* (which was the amount of the shares of each of the plaintiffs) with contingencies of increases by the death of the other children, this bequest of 10,000*l.* must be taken as a bar to what may happen by the contingency. I am therefore of opinion, that his intent was to dispose of his personal estate in such a manner, as that if the plaintiffs choose to take by the will, they should be barred of what was due by the custom. And so decreed (*m*) an election; and if they took by the will, then to take nothing by the custom; reserving to the plaintiff *Elizabeth* her election until twenty-one or marriage; and that Mr. *Hervey* and his wife should make theirs before the first day of *Hilary Term* next.

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(*m*) *Reg. Lib. A. 1735. fol. 592.*

DE

Term. S. Michaelis

9 Geo. II.

IN CURIA CANCELLARIÆ.

Case 26.
Novemb. 12.

Attorney General versus Scott.

A. devises a trust estate to *B.* and his heirs, and dies. *B.* dies. The wife of *B.* cannot be endowed of it.

(139)

ANNE Ratford being seised in fee of lands in London and in *Essex*, she and her husband levied a fine, and by lease and release, February 18, 1711, conveyed the premises in London to *Thomas Barker* and his heirs, to the use of him and his heirs, in trust to permit the said *Anne* and her husband to receive the profits during their lives, and the life of the survivor of them, with power to *Anne* to charge the premises with 400*l.*; and subject to such power, *Barker* to stand seised to the use of the heirs of the survivor of *John* and *Anne*. And by another deed, April 2, 1712, the *Essex* estate was conveyed in the same manner; *Anne* died in 1713, *John* the husband died in 1723, having by his will devised this trust estate to *Locklay* and his heirs (who was married to his now wife in 1713,) and afterwards, in 1724, and in 1727, mortgaged several parts of the premises to the defendant *Scott*. The estate being now to be sold, the question was, whether *Locklay's* wife had any title of dower to this trust estate, which might hereafter affect the purchasers, she having insisted upon it in her answer.

For

For the wife were cited *Fletcher (n) versus Robinson*, *Precedents in Chan.* and *Banks versus Sutton*, at the *Rolls*, *March* 1733, where dower (o) was decreed of the trust-estate; because there was a direction that the trustees should convey, and therefore looked upon as an actual conveyance.

(n) Cited in *Lord Dudley and Ward v. Lady Dowager Dudley*, *Prec. in Chanc.* 250, 2 *P. Will.* 642, S. C. (cited) Of this case, Lord Talbot in *Chaplin v. Chaplin*, 3 *P. Will.* 234, expresses himself thus, "it seemed a strange case, and " a most extraordinary trust, and was probably a short note " of the case for the private use of some gentleman, and " could be of service to no other; for if the father the " *cestui qui trust*, should have come for a performance of " that trust, he could never have recovered; but the son " should have held the land discharged, it being a fraudulent " trust, made to protect the estate against a forfeiture."

(o) In *Banks v. Sutton*, 2 *P. Will.* 715, Sir Jos. Jekyll seemed to intimate an opinion, though with considerable diffidence, of a distinction, whether a wife should be entitled to dower out of a trust of inheritance, where it is created not by the husband, but some other person, and no time limited for conveying the legal estate; but it is to be observed, that he rested his decision of that case chiefly upon another point of equity, viz. "that as in that case, there " was a time limited for conveying the legal estate, and " that time had arrived in the life time of the plaintiff's " husband, the widow was therefore entitled to dower, " upon a principle well known and established in a court " of equity, that where an act is to be done by a trustee, " that is to be looked upon as done, which ought to be " done." However Lord Talbot decided the *Attorney General v. Scott*, without any regard to the distinction intimated by Sir Jos. Jekyll; and it seems now to be clearly settled, that a wife cannot be endowed of an equity of redemption in fee, or of any other *trust-estate of inheritance*, wherein the husband had not, nor has the legal right to the estate, *Chaplin v. Chaplin*, 3 *P. Will.* 229, *Godwin v. Winsmore*, 2 *Atk.* 525, *Burgejs v. Wheate*, 1 *Black. Rep.* 138. 161. *Dixon v. Saville*, *Bro. Cha. Rep.* 326.

Lord

Lord Chancellor. The question is very considerable, and very proper to be settled. Dower is properly a legal demand; and here the estate is limited to the trustees and their heirs, to the use of them and their heirs: so that it is actually executed in the trustees; and whatever comes after can be looked upon only as an equitable interest: for, there cannot be an use upon an use. The question therefore is, Whether the *feme* of the devisee shall be intitled to dower at law? No dower was of an use before the statute, it being intirely a legal demand; as appears from *Vernon's case*, 4 Co. 1. And then how can she be dowable of a trust after the statute, since no difference can be assigned between a trust now, and an use before the statute? And courts of equity must follow the same rules now as to trusts, as prevailed before the statute as to uses. How the difference now received, between tenant by the curtesy and tenant in dower, ever came to be established, I cannot tell; but that it is established is certain. Nor have I heard any case cited to the contrary, but that of *Fletcher versus Robinson*, which was determined upon another reason, that does not affect the present case. That of *Bottomly versus Lord Fairfax*, Pasch. 1712. *Precedents in Chan.* 336. is an exact authority that a woman shall not be endowed of a trust; and the received practice of inserting trustees to bar dower would otherwise be of no signification. For me therefore to do a thing merely upon the authority of an obscure case, (*viz.* *Fletcher versus Robinson*) which does not seem to have been determined upon that point neither, and that might perhaps shake the settlements of five hundred families, is what I cannot answer to my conscience. I do not think it necessary to say any thing as to the cases where terms are standing out, as *Lady Dudley versus Lord Dudley*, *Precedents in Chan.* 241. and that of *Countess of Radnor versus Vandebendy*, 1 Vern. 356. and *Show. Parliament Cases* 69. For they are different, and are to be considered in another light. Nor is there any greater necessity,

cessity, at this time, of determining the question where the legal estate is first in the husband, and consequently the wife intitled to the dower, and then is conveyed to trustees by the husband; for, in the present case, it was originally a trust-estate, and could not be any inducement to her in her marriage; for, she married in 1713. and the trust-estate was not devised to her husband until 1723. (p) ten years after her marriage.

And so decreed the wife not dowable,

Law versus Law. (q)

Case 27.
14 Novemb.

EDMUND Law, the plaintiff's late husband, gave his elder brother a bond, reciting, That whereas the said *Edmund Law* had been for many years an officer and supervisor of excise, by the procurement of his brother *Richard Law* the defendant, and that the said *Richard Law* had promised to use his utmost endeavour and interest to procure him to be advanced to the office of collector of the excise, upon condition that the said *Edmund Law* shall pay to the said *Richard Law* 10*l.* per ann. so long as he shall continue supervisor (his then office) and 20*l.* per ann. as long as he should be collector: the condition therefore was, That if *Edmund* should pay the said 10*l.* and 20*l.* per ann. &c. *Edmund Law* paid one sum of 10*l.* and died intestate; and the defendant *Richard Law* brought an action upon the bond against the plaintiff, the widow and administratrix of *Edmund*; and she thereupon brought her bill to set aside this bond, and to have the 10*l.* refunded.

A bond given to pay money for procuring the office of collector of excise, is within the Stat. 5 & 6 Ed. 6. against sale of offices; and falls within the reason of marriage-brocage-bonds. Wherefore decreed it to be delivered up to be cancelled, and perpetual injunction.

Lord Chancellor. It is agreed on all hands that this bond is good at law: wherefore the representa-

(141)

(p) *Reg. Lib. An.* 1735, fol. 84.

(q) 3 *P. Will.* 391, S. C.

tive of the obligor is obliged to come hither for relief. The general head of relief goes upon fraud and imposition; of which there is nothing suggested in the present case, but the whole consideration appears in the condition. The question is, Whether this be such a bond as a Court of Equity ought to relieve against?

This is but one agreement although respecting two periods, *viz.* That of having obtained the office of supervisor, and that of procuring the collectorship: and then the condition is to pay two several sums. It relates to an office which is certainly within the *Statute* 5 & 6 *Ed.* 6. For, it concerns the King's revenue, and cannot be executed by deputy; and no body can say but that the sale of offices within that *Statute* is a public mischief; the Legislature has adjudged it to be so. And although this be not directly a sale within the *Statute*, yet it is in effect the same; there being little or no difference between a commissioner's taking a sum of money, and another person's taking it to influence the commissioner: the inconveniencies are the same; since thereby the persons appointing are deceived, and so is the public; and there is a very strong presumption that the person so giving is not duly qualified for the execution of the office: and in this very case it appears that the obligor was suspended. The objection, That this being a penal law, is not to be extended in equity, is easily answered; for, though penal laws are not to be extended as to penalties and punishments; yet if there be a public mischief, and a Court of Equity sees private contracts made to elude laws enacted for the public good, it ought to interpose. Here is a bond given for future acts, as well as for such as are passed; and which is the same as if given to a commissioner for a direct sale. And indeed had there been no precedent of the same nature, I should have had courage enough to have made one in the present case: but I shall be abundantly warranted by what the

the Court has done in cases within the same reason. Bonds of resignation are not intirely parallel; for, the relieving or not relieving against them, depends upon the use made of them *ex post facto*; (r) and bonds given in fraud of marriage are relieved against, by reason of the extortion and imposition which attends them; as in the Duke of *Hamilton's* case, 2 *Vern.* 652. But marriage-brocage bonds fall directly within the reason of this case, being intirely a voluntary act; nor does the Court interpose therein for the particular damage to the party only, but likewise from a public consideration; marriage greatly concerning the public. And it is no objection, that the point of relieving against them has been settled but lately; for, it was settled upon very great consideration, and there are now many precedents of it: if therefore in this and the like cases, this Court does interpose and regulate things of a public nature, as in the case of a young heir's entering into unreasonable contracts during the life of the parent; why shall it not do the like in the case before us, the inconveniences of winking at such practices being plain and obvious to every man's understanding? Some cases have been cited for the defendant, none of which come up to our present case; as *Lawrence versus Brazier*, 1 *Chan. Ca.* 72. where it does not at all appear what the office was, and the only question there is, Whether the party should pay for the time he was dispossessed; that of *Beresford versus Done*, 1 *Vern.* 98. (s) related to a commission in the army: and

(r) *Durston v. Sandys*, 1 *Vern.* 411, *Hawkins v. Turner*, *Prec. in Chanc.* 513, *Hesketh v. Gray*, 2 *Burn's Eccl. Law*, 341, *Peel v. the Earl of Carlisle*, *Sho.* 227, 534, *Bishop of London v. Fytche*, 1 *Bro. Cha. Rep.* 96, in which case the illegality of general bonds of resignation was determined upon an appeal to the *House of Lords*, 30th May 1783, vide a full report of this case, with the arguments of the judges, in *Cunningham's Law of Simony*.

(s) *Ive v. Ash*, *Prec. in Chanc.* 199, S. P.

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no law prohibits the sale of such, no more than it does that of purser of a ship; which was *Symmonds versus Gibbons*, (t) 2 *Vern.* 308. That of *Lockner versus Strode*, 2 *Chan. Ca.* 48. had nothing illegal in it; for, the payment was not to be absolute, but only in case the profits amounted to 400*l.* or more, besides the whole profits belonging to the sheriff himself, that was but a reservation of what was his right, viz. the profits of the office. And in that of *Bellamy versus Burrow*, the sole question was, Whether that office was capable of a trust? So that none of those cases come near to the present one; which is clearly within the mischief of 5 & 6 *Ed. 6.* and therefore not to be endured.

And therefore decreed (u) the bond to be cancelled, and a perpetual injunction. (x)

Case 28.
14 *Novemb.*

Ex parte Lyne, a Lunatic.

A custody of a lunatic's estate granted to baron and feme (the feme being next of kin) determines on her death.

THE custody of the lunatic's estate was granted to husband and wife, the wife being next of kin to the lunatic: the wife died, and the *Lord Chancellor* held, that the husband's right to the custody of the lunatic's estate was determined, it being a joint grant, and a mere authority without any interest; and said, it had been so determined in the *Lord King's* time.

(t) *Vid. Purdy v. Stacey*, 5 *Burr.* 2698.

(u) *Harrington v. Du Chatel*, 1 *Bro. Cha. Rep.* 125, in which case a perpetual injunction was granted against a bond for the purchase of an office, upon the public policy of the law, and being similar to marriage-brocage bonds, although the office was admitted not to be within the Stat. of 5 & 6 of *Ed. 6.* *Morris v. M'Culloch*, *Ambl. Rep.* 433; *Debenham v. Ox*, 1 *Ves.* 276, 3 *Bac. Abr.* 735-6.

(x) *Reg. Lib. An.* 1735, fol. 86.

*Kensley versus Langham.*Case 29.
18 Novemb.

SIR *Edward Nichols* being seised in fee of several lands in *Northamptonshire* and elsewhere, *August* 12, 1708. made his will; whereby he devised his manor of *Faxton*, and lands lying there, and other lands in the will mentioned, to trustees and their heirs, in trust for the plaintiff *Jane Kensley*, and the Lady *Susanna Danvers* her sister, and all other his messuages, cottages, closes, woodlands and tenements (y) whatsoever in *Faxton*, *Haslebitch*, *Subby* and *Hardwicke*, in *Northamptonshire*, and all other his lands and tenements not therein after devised, upon trust that his said trustees, and the survivor of them should, out of the rents, issues and profits, yearly for ever, pay the sum of 30*l.* a-piece, without any deduction, to the several vicars, for the time being, of eight several vicarages in his will named, for the augmentation of their vicarages; and that whenever the profits of those lands amounted to more than the yearly payment, and his trustees' expences, that then the surplus should be disposed of in such charitable uses as his trustees should think fit; the testator died, leaving the plaintiff and the lady *Susanna Danvers* his heirs at law; which latter died soon after, without issue; and now the church of *Hardwicke* becoming void (which was full at the time of the testator's death) the plaintiff brought her bill to have the presentation: for, the advowson not passing by the devise to the trustees, did belong to her as heir at law.

A. seised in fee, devises his lands and tenements in *B.* to trustees, to apply part of rents for charitable uses. The testator dies; the church of *B.* becomes void: the heir at law shall present.

(144)

(y) The words of the devise, as stated in *Reg. Lib.* are, "all other his messuages, lands, tenements, and hereditaments; whatsoever, in *Faxton*, *Haslebitch*, *Subby* and *Hardwicke*, and all other his lands and tenements," &c.

Note, the word "hereditaments," seems much stronger than any of the other words used.

The trustees and vicars insisted in their answer, that by the general devise the advowson passed; and that the testator intended it to pass to make up what deficiency might be in the estate.

Lord Chancellor. The question is, Whether the advowson passed to the trustees by the will? And I rather incline to think, that by the first words it does not pass, there being lands *lying and being at Hardwicke* to satisfy these words; and an advowson being but a right of presenting, cannot be said to be *situate*. (z) Nor am I clear that the word *tenements*, (a) which has been said to carry the advowson, does extend to incorporeal inheritances: but I do not think it necessary to enter into that question at this time. And I shall consider it a devise to the trustees, so far as it may be beneficial to the charity, but not where it cannot be any way beneficial to it; as in the present case, the church being actually void, and consequently cannot be beneficial; for, no money must or can be taken for the filling it; and if so, the rule, *That whatever is not disposed of remains in himself*, must take place, and the heir at law consequently be intitled to this presentation, there being no provision that either the trustees or the charity should have it. It has been said indeed, that this might be a beneficial devise, by the trustees selling the next avoidance; but as he has made no such provision, I do not think it proper by such a construction to advance a thing which would be much better if intirely prohibited;

(z) *Co. Lett.* 17, 2 *Black. Com.* 21-2, 1 *Burn's Eccles. Law* 8.

(a) *Sed Vid. Co. Litt.* 6, 19, 20, 374, *b. Vin. Abridg. Title Assets*, p. 145. pl. 28, *Westfaling v. Westfaling*, 3 *Atk.* 460, 2 *Black. Com.* 16, 17, where it is said, that, "as lands and houses, are tenements, so, is an advowson, a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements."

especially

especially in the present case, where it cannot be proved that he intended any such thing. In cases of mortgages, the mortgagor presents to every avoidance before foreclosure: (*b*) for, the lands being but a pledge in the mortgagee's hands for the payment of his debt, he can receive nothing but what may be accounted for in its nature; which a presentation cannot be; and therefore he shall not have it. (*c*) So in *Alberton* versus *Sir Walter Calverley*, the trustees having no interest, only a bare power of nomination, the right of presentation was decreed to be in the infant. As therefore this particular turn is not to be given away by the will, and since nothing is intended for the trustees but a reimbursement of their charges, and this cannot be applicable to the charity, I think this turn belongs to the heir at law, and that her presentee must be admitted (*d*).

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A case was made for the opinion of the judges of B. R. Whether the word *tenements*, in the will,

(*b*) *Vide Amburst v. Dawling*, 2 *Vern.* 401, *Jory v. Cox*, *Prec. in Chanc.* 71, *Gardiner v. Griffith*, 2 *P. Will.* 404. *Gully v. Selby*, *Strange* 403, *Mackenzie v. Robinson*, 3 *Atk.* 559.

(*c*) Upon the same principle it is, that a guardian in socage shall not present to an advowson, because he can receive nothing for it, and by consequence he cannot account for it; and by the law, he can meddle with nothing which he cannot account for, *Co. Litt.* 17.

(*d*) *Reg. Lib. A.* 1735, fol. 333, by the name of *Kemsey v. Earl of Halifax*. From which it appears the Lord Chancellor directed, that a case should be made for the judgment of the Court of King's Bench, on this point, viz. whether the advowson in question, passed by the will of *Sir Ed. Nicholas* to the defendants, the trustees, or not: and the consideration to whom the right of presentation belonged was reserved, until the cause came on to be heard on the certificate of the judges.

O

would

would pass the inheritance of the advowson to the trustees? (e)

Case 30.
22 Novemb.

Chapman versus Blissett.

A. devises his freehold, copyhold and leasehold, and all his real and personal estate not before devised to three trustees, their heirs, &c. in trust to pay his son *B.* an annuity; and if he should have any child or children: the residue of the rents, during *B.*'s life, for the education and benefit of such child or children; and after *B.*'s decease, a moiety of the trust estate to such

JOSEPH Blissett devised all his freehold, copyhold and leasehold, and all his real and personal estate not therein before devised, to three trustees, their heirs, executors and assigns, in trust to pay his son *Isaac Blissett* 37*l.* quarterly; and if he married with consent, then double the sum; and if he should have any child or children, he gives the rest and residue of the yearly rents and profits of his said trust-estate, over and above the said yearly payment, to be applied, during the life of the said son, for the education and benefit of such child or children: and then he goes on in these words, *viz.* "After my son's decease, I give one moiety of the said trust-estate* to such child and children of my said son as he shall leave, their respective heirs, executors and assigns, and to the survivor; and the other moiety I give to the child and children of my grandson *Joseph Dickenson*, and every other child and children of my daughter, their heirs and assigns, and the survivor of them. Then in case *Isaac* die without issue, the first moiety to *Joseph Dickenson* and other child and children of *Sarah* and their heirs, &c." Then by another child and children as he shall leave, their heirs, &c. the other moiety to the child and children of his grandson *C.* and every other child and children of his daughter *S.* their heirs, &c. And if *B.* die without issue, the first moiety to *C.* and other child and children of *S.* and their heirs, &c. and directs an annual payment to such wife as *B.* shall marry. The testator died; *B.* married, and had issue a son and daughter, and died; afterwards *C.* married, and had issue a daughter, and died: the limitation to the daughter of *C.* is well supported by the estate in the trustees; or, if not, is good as an executory devise; and the profits, &c. shall go to the children of *B.*

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(e) Note, The judges afterwards certified, that the advowson did not pass by the devise in question, from a manuscript note of the late Mr. Cox of Lincoln's Inn, contained in No. fol. in the library of that society.

clause

clause he appoints 100*l.* *per ann.* as a jointure to any wife his son *Isaac* should marry, in case he married with consent; and gives to his said grandson *Joseph Dickenson* 30*l.* *per ann.* for his maintenance, until his age of fifteen, and then 200*l.* to put him out apprentice: soon after the testator died. In the year 1712. *Isaac Blissett*, the testator's son, brought his bill for a discovery, and it was decreed (*inter alia*) by Lord *Harcourt*, That the surplus of the profits of the testator's real estate (over and above the several payments directed by the will) and the produce of the personal estate should be improved for the benefit of such child or children as the said *Isaac* should have; and that after *Isaac's* death, and upon his having a child, all parties interested should apply to the Court. Soon after *Isaac* married with consent; and having issue a son and daughter, applied to the Court for farther directions: whereupon it was decreed by the Lord *Cowper*, that the produce of the surplus of the testator's estate to the time that *Isaac* had a child, should go in augmentation of the said surplus; but that the produce of such surplus, from the birth of *Isaac's* first child, should be paid to him for the maintenance of his children during his life; and that at his death the estate should go according to the limitations in the testator's will. *Isaac Blissett* continued accordingly to receive the surplus profits until his death, which was upon the 10th of *October*, 1728: leaving a son and two daughters, the now defendants. About two years after *Isaac's* death, *Joseph Dickenson* married, and had issue the plaintiff his only daughter, and died soon after.

This cause was first heard at the *Rolls*, where it was decreed for the plaintiff; and that the produce of the surplus of the testator's real and personal estate incurred after his death, and before *Isaac* had a child born, should not go to such child, but should go in augmentation of the *residuum* of the testator's estate.

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And now coming on to be reheard, two questions were made; First, Whether the children of *Joseph Dickenson* took by way of executory devise or contingent remainder? for, if they took by the latter, then the plaintiff could never take, she being born three years after *Isaac's*, the particular tenant's death. The second question was, What should become of the surplus of the real and personal estate of the testator from his death until the birth of *Isaac's* first child? Whether it should go to the children of *Isaac*, or whether it should go to the augmenting the *residuum*?

Mr. *Attorney General*, Mr. *Verney* and Mr. *Fazakerley* argued for the defendants, that the rules of trusts vested, were the same as those of estates limited to uses at law; and that no rule was better known than that the remainder must vest *eo instante* the particular estate determines. That the danger of perpetuities was equal in trusts and legal estates; and that executory devises were no more to be favoured here than at law. That where nothing goes to the heir at law as undisposed of until the contingency happens, upon which the devisee's interest is to arise, then it is a contingent remainder. That here was no descent to the heir in the mean time, the whole being disposed of during the life of *Isaac*. And though part of the profits were to be laid out, during his life, for the benefit and education of his children, and there were children born before his death, that did only vest their interest in them in their father's life-time; and there being a compleat disposition of the profits during the life of *Isaac*, makes it a freehold of the trust in being, as to the whole trust, viz. part to himself, and part to his children. Besides, no more is executed here in the trustees than is sufficient to serve the purposes specified during the life of *Isaac*; and both the trust-estate and interest determine with his life: for, the trustees cannot have a greater estate by implication than what the express words give them, unless the purposes

purposes directed necessarily require it; the Court never extending the construction against the vesting of uses. Now, after *Isaac's* death, the legal estate is devised, part to his children, and part to the children of *Joseph Dickenson*; and is devised by *verba de presenti*, which are only proper for a remainder, and to make an use executed: for, whenever the devise is *in verbis de presenti*, and the testator intends a present devise, no fact can alter it: and if it cannot take effect as such, it shall rather be void than be construed a future devise; the consequences being no ingredient in the construction. This appears from the case of *Scattergood versus Edge*, 1 *Salk.* 229. where it was agreed, that if the words had been to a child to be born, it would have been good by way of executory devise; but being to trustees for eleven years, and then to the first son of *A.* in tail, who had no son at that time, that it was void; there being no person in *esse* capable of taking at that time. The same determination was in *Goodright and Cornishe's* case, 1 *Salk.* 226. in both which cases it was impossible to support the devise but as a future one; yet the testator having devised by *verba de presenti*, the Court would not make a construction in favour of the party not born. What has been said for the plaintiffs, that this was not too remote a contingency because confined to arise within the compass of a life, is agreed: but the question is, Whether it was the testator's intent to pass it in that manner? and if it was not, then it must be a contingent remainder; and as such, by its not taking effect in due time, upon the determination of the estate of freehold in *Isaac*, is void, and can never arise.

Mr. *Solicitor General* replied for the plaintiff, That although the devise was *in verbis de presenti*, yet considering the whole frame of the will, it was evident that the testator's intent was to extend it to the children born thereafter, the words being used

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promiscuously, and making no difference between the children already born, and those to be born. And in *Scattergood* and *Edge's* case, there was nothing to shew the intent to be to take in the children unborn: whereas the clause in the will, whereby, upon the death of *Joseph* and his daughter without children, he gives their moiety to *Isaac's* children, shews plainly that he must mean children to be born, since he knew that *Joseph* had no children at that time; and that he, by another clause, provides a particular maintenance for him until his age of fifteen: nor was it more reasonable to construe this to be an use executed in the trustees only during *Isaac's* life, and then to determine; for, there are many other purposes in the will to be served by them, which do not any way depend upon *Isaac's* life, as the annuity given to his wife, the direction about putting out boys to apprenticeship, and others which are quite distinct from, and have no dependency upon *Isaac's* life, but can arise no way but from the trust-estate: and surely it could never be his intent to make such a disposition as would be liable so soon to be defeated by the determination of the trustee's estate, but rather to continue the uses for the benefit of all that were named; which could only be done by the continuance of the trustee's interest: and the words being well able to bear that construction, it is the most reasonable way of taking his intent.

Lord Chancellor. The first question is, whether this limitation to the plaintiff be good or void? It has been said, that the trust-estate determining upon *Isaac's* death, the limitation to *Joseph's* children was of a legal estate, and being by *verba de presenti*, could enure only as a contingent remainder; and consequently the plaintiff could never take, because not in *esse* at the determination of the particular estate by the death of *Isaac*. The whole depends upon the testator's intent, as to the continuance of the

the estate devised to the trustees, whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose: if an estate be limited to *A.* and his heirs, in trust for *B.* and his heirs, then it is executed in *B.* and his heirs: but where particular things are to be done by the trustees, as in this case the several payments that are to be made to the several persons, it is necessary that the estate should remain in them so long, at least as those particular purposes require it. (*f*) No authority has been cited to warrant the doctrine, that in case of such a general limitation to trustees as the present case is, that they should have but a particular interest, and then that interest to determine; such a case might indeed be framed, but was never intended here; there being many purposes to take effect, which might endure longer than the life of *Isaac*; and the taking it in so confined a sense, would be making a forced construction to disappoint the testator's intent, which was to make an intire disposition of the legal estate to the trustees.

Considering it therefore as a trust-estate, the question is, whether this limitation to the plaintiff shall enure by way of executory devise or contingent remainder? and I think no objection against its taking place as an executory devise, that it is limited by *verba de presenti*: for, it appears that *Joseph* was very young at the time of the devise, and the testator's providing a maintenance for him

(*f*) Accordingly it has been determined, that trustees shall have a fee without words of limitation, where the purposes of the trust require it, and the intention of the testator cannot otherwise be effectuated and carried into execution. *Collier's case* 6 Co. 16, *Willis v. Lucas*, 1 P. Will. 472, *Ackland v. Ackland*, 2 Vern. 687, *Shaw v. Weigh*, 2 Strange 798, *Oates lessee of Markham v. Cooke*, 3 Burr. 1685, 1 Black. Rep. 543, *S. C. Rogers v. Gibson*, 1 Ves. 491, *Fearne's Conting. Rem.* 231.

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until he should attain to the age of fifteen, is a proof of his knowing that *Joseph* had no children at that time, it being intirely improbable that he should have any in being, when he was himself of so tender an age at the time of the devise: so that although the words be *in presenti*, they must be taken in a future sense, in order to serve his intent; which appears manifestly to be, that the children of *Joseph* should take in its creation; therefore it was executory. But then it has been said, that when *Isaac* had a son born, the remainder vested in him, and consequently, the limitations to the other became vested remainders likewise; and the remainder-men not being *in rerum natura* at the time of *Isaac's* death, this remainder can never arise. But in regard to trusts, the rules are not so strict as at law; for, the whole legal estate being in the trustees, the inconveniency of the freehold's being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented; there being always a sufficient tenant to the *præcipe*; the defect of which was the sole mischief the law provided against. And even the reason is not now so strong, as when real actions, which can be brought against the tenant of the freehold only, were more in use. The whole therefore being in the trustees, supports the several uses that are to arise out of their interest, which continuing in them until the birth of the plaintiff, whether it be taken as a future limitation, or as a contingent remainder of a trust, is good either way. (g)

The

(g) It seems therefore from this determination, that in cases where the legal estate is devised to, and vested in trustees in trust, there is no necessity for any preceding *particular estate* of freehold, to support contingent limitations; for that the legal estate in the trustees, will be sufficient for the purpose; and consequently in such cases, it is not necessary, that a contingent remainder should vest by the

The next question is, what shall become of the intermediate profits from the time of the testator's death, until the birth of *Isaac's* son? Upon this head, and in this very case, there have been two different decrees: the first by the Lord *Harcourt*, who thought those profits should belong to the children of *Isaac* when born; the other by the Lord *Cowper*, who was of opinion, that the children had no right to them, but that they should go in augmentation of the trust-estate. I am at a loss how to determine between two as great men as ever sat here: but the whole being open before me, I must give my judgment in the manner which seems to me most reasonable. He gives, in case *Isaac* should have any children, the *rest and residue* of the yearly rents and profits for the education and benefit of such children. Now the words *rest (b) and residue* are words of relation, and part of somewhat that went before; the preceding disposition being of yearly rents and profits, the words *rest and residue* must be applied to them, and not to the capital, which was not given away before. Indeed had those children never been born, then they could never take; but when they are born, how can I determine that they shall not take what is expressly given to them without any distinction between profits before and after their birth? The words *benefit and education* make it plain that they are intitled to them all absolutely and intirely.

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And so varied (i) the decree at the *Rolls* as to this last only.

the time the preceding trust limitation expires. So *Hopkins v. Hopkins*, ante 44, 1 *Ves.* 269, and 1 *Atk.* 581, S. C. *Fearne's Conting. Rem.* 231.

(b) *Rogers v. Gibson*, 1 *Ves.* 491, 495.

(i) *Reg. Lib. A.* 1735, fol. 298.

Case 31.
24 Novemb.

Ashton versus Ashton.

A. devises to his nephew *B.* 6000*l.* *South Sea* annuities to be laid out in land, and settled on the plaintiff, &c. and by codicil taking notice of it, gives 1200*l.* to the same uses; and made *B.* his executor, and dies possessed of a large personal estate, but had only 5360*l.* in

South Sea annuities: this is a specific legacy; and this Court will not decree the deficiency to be made up out of the other personal estate.

JOSEPH Ashton, by will,* gave to his nephew Henry Ashton, and two other persons, the sum of 6000*l.* *South Sea* annuities; upon trust, as soon as conveniently might be after his death, to sell and lay out the same in a purchase of lands, to be settled on the plaintiff for life, remainder to his issue; and afterwards by a codicil, dated three days after, taking notice that he had given his trustees such a sum, gives 1200*l.* to be laid out in land to the same uses, and made his nephew executor: the testator died, leaving a very considerable personal estate; but had only 5360*l.* in annuities at the time of the will made. The question was, whether it should be made up 6000*l.*? or, whether only the testator's specific fund passed by the will? It had been decreed at the *Rolls* to pass nothing but what the testator had in *South Sea* annuities?

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Lord Chancellor. This is a specific legacy; the testator has given 6000*l.* *South Sea* annuities stock, having at that time but 5360*l.* And if a man devise a thing which he hath not, it is not such an estate as a court of equity can relieve against. If in this case he had actually had as much as he devised, but before his death had sold a part, it had been an ademption for so much: but here is no ademption; for, he having no more than 5360*l.* no more can pass. Specific legacies are different in their nature from all others; for, if there be a deficiency of assets, there shall be no abatement of the specific legacy: and on the other hand, if the testator (*k*) alien any part of it, or the whole, the legatee has no claim on any other part of the estate; and in this case, this being a specific legacy, and the testator not having so much at that time, no relief

(*k*) So *Partridge v. Partridge*, *post* 226.

can be given to the legatee : it is a mistake in the testator, but such as cannot be helped here. If a man, through a mistake, devises the inheritance of an estate which he really hath not, this Court cannot put the devisee in a better condition than the will has left him. Nor is this to be compared with the case in 2 *Leon.* where it is held, that if one devises his land in such a place, and has no land, but only tithe in that place, the tithe shall pass ; for, otherwise there would be nothing to satisfy the devise : but if one devises his lands, expressing them to be of the value of 600*l.* and they prove to be worth but 500*l.* this Court can make no addition ; for, being a specific devise of the estate, the devisee must take it as he finds it. (1)

And so affirmed the decree. (m)

Cray versus Rooke.

Case 32.
11 Decemb.

BILL brought by the son and heir, and his two sisters, to have a distribution of their father *Jeremiah Cray's* estate, and to set aside a bond given A bond given to a kept mistress for the maintenance of her and provision for a child she had by the deceased, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud ; but shall not be paid out of the personal estate until after simple contracts, but shall be paid out of the real estate, if there be one, in case the personal estate falls short.

(1) This case seems to have been determined upon the testator's directing the 6000*l.* *South Sea* annuities to be sold, and the produce thereof to be laid out in a purchase of lands, which strongly implied that the testator only intended to give the *South Sea* annuities which he was possessed of ; and that he did not mean to have additional annuities purchased, in order to be sold out again presently afterwards.

(m) *Reg. Lib. A. 1735, fol. 112, et vide 3 P. Will. 387, S. C. Hinton v. Pinke, 1 P. Will. 540, Partridge v. Partridge, post 226, Purse v. Snaplin, 1 Atk. 414.* in which Lord *Hardwicke* expresses his approbation of this case. *Avelyn v. Ward, 1 Ves. 424, Drinkwater v. Falconer, 2 Ves. 623. Sleach v. Torrington, 2 Ves. 560. Hambling v. Lister, Ambl. Rep. 401. Ashburner v. Macguier, 2 Bro. Cha. Rep. 108,* which recognises the material authorities upon this subject.

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by his said father to the defendant *Katherine Rooke*, in the penalty of 2000*l.* to pay her (whom he had formerly kept as his mistress) the yearly sum of 80*l.* The defendant insisted by her answer, that the bond was good; that she being a woman of virtue, and intitled to some fortune, was prevailed upon, by large promises, to live with the said *Jeremiah Cray*; whereby she greatly disoblged all her friends; and that she and *Jeremiah Cray*, cohabited from *January 1728*, to *April 1731*, when the said *Cray*, for making some provision for her child (then about two years old) executed this bond, without any fraud or imposition, whereby he bound himself and his heirs in the penalty of 2000*l.* for the payment of a yearly annuity of 80*l. per ann.* for her maintenance, and that of her child; the said *Jeremiah Cray* being then about marrying (which he afterwards did) the plaintiff's mother.

The master of the *Rolls* had decreed the annuity, secured by the bond, to be paid after all other creditors, whether by bond or simple contract, this being a voluntary bond; and that in that course of payment, a fund should be set apart out of the personal estate; but had given no direction whether the real estate should be chargeable with this annuity, in case of a defect of the personal assets.

Wherefore the defendant *Rooke* appealed, and it was insisted for her, First, That this bond was not to be considered as a mere voluntary bond: that the defendant *Rooke* appeared to be a virtuous young gentlewoman, before unhappily seduced by Mr. *Cray*; that this was *premium pudoris*, &c. and considerations may arise as well by suffering loss and damage at the instance of another, as by giving money, &c. And that in *Harris* and *Marchioness of Annandale*, (n) decreed *June 25, 1727.* and affirmed

(n) *Vide 2 P. Will. 433, S. C.*

in the *House of Lords*, (o) *March* 19, 1728. a like bond was to be paid in a course of administration, and not postponed, &c. And in *Ord and Blackett*, decreed by Lord *Macclesfield*, it appearing that Sir *William Blackett* had seduced the plaintiff, a young lady of 10000*l.* fortune, and settled upon her 300*l.* *per ann.* annuity, by a deed, which was not an effectual conveyance, so that she could not recover at law. This Court interposed, and decreed against the heirs at law of Sir *William Blackett*. So in the case in the *Exchequer*, cited in *Harris and Lady Annandale*, in *Eq. Abr.* 87. where a man granted an annuity to a woman of 30*l.* *per ann.* out of lands he had no title to: the Court decreed him to make a good grant, &c. And therefore the Court would not consider the grantees as meer volunteers.

It was also insisted, that if the bond was to be considered as voluntary, and to be postponed to creditors by simple contract; yet as it affected the real estate, and no pretence to set it aside for fraud, the bill, so far as it sought on behalf of the plaintiff the heir at law, to set the bond aside, ought to have been dismissed, and the plaintiff left to her remedy at law against the real estate, or some provision made by the decree for the defendant *Rooke* to have satisfaction out of the real estate, &c.

(155)

Mr. *Attorney General* for the plaintiffs. This at best is to be considered as a voluntary bond. There is a difference where such bonds, &c. are given before seducing, and where after, and this appears to be long after; and it would be strange to put such bonds, &c. upon a better foot than bonds and securities given after marriage, which are always deemed voluntary, &c.

(o) 3 *Bro. P. C.* 445. S. C.

As to the case of *Ord* and *Blackett*, and the other cases in the Court of *Exchequer*, they are founded upon this; that though a bond or conveyance be at first voluntary, yet if the party who gives it does afterwards by fraud destroy or endeavour to defeat it, equity will relieve against the act of the party himself. And so was the case of *Pitt* and *Pitt* at the *Rolls*; where it appearing that the late Governor *Pitt*, had granted the younger son (the plaintiff) an annuity of 300*l. per ann.* in order to qualify him for member of parliament, and afterwards got the deed and burnt it; it was decreed against the eldest son, the heir at law, to make it good.

(156) *Lord Chancellor.* No relief in equity can be had against this bond. Here is no pretence of fraud, and therefore no reason to relieve against it. It is indeed a voluntary bond, being given after actual cohabitation, and cannot be in a more favourable condition than a settlement made after marriage, which is looked upon as voluntary; although the obligation of nature is as strong upon a man to provide for his children after marriage, as before it.

If then it be once settled to be good, the next question is, In what degree it shall be paid? And as to that, I think, that according to the Lord *Harcourt's* opinion, the resolution in *Jones* and *Powell's* case, *February* 23, 1712. (and *Abr. Eq. Ca.* 84.) all creditors, whether by bond or simple contract, shall be preferred; but that this bond shall be paid before legacies: for, the bond, although it be voluntary, transfers a right in the life-time of the obligor; but legacies arise only from the will, which takes effect only from the testator's death; and therefore ought to be postponed to a right created in the testator's life-time: the case of *Fairbeard* and *Powers*, (p) 2 *Vern.* 202. proves this expressly;

(p) In which case it was held, that a voluntary judgment given by a freeman of *London*, payable three months after his death,

pressly; and that the Lord *Harcourt's* opinion in *Wood* and *Powell's* case, or in *Jones* and *Powell's* case, was grounded upon precedent authorities.

The next consideration is, how far it shall affect the real estate in case of a deficiency of the personal assets? Now although it be a voluntary bond, and postponed in point of payment even to simple contract creditors; yet it must not be in a worse condition than they are, its being voluntary giving the heir no right to set it aside: for, as the ancestor might have granted away the estate intirely from his heir, so, when he thinks proper to charge himself and his heirs, the heir shall be bound in respect of the assets descended upon him from his ancestor: and as the whole is now before me, I must give my opinion upon it; since the leaving the defendant to sue the bond at law, where she can recover but the penalty, and where the parol must demur until the heir (who is now but three years old) comes to his full age, would be delaying her much too long; and since even after advantage taken of the infancy at law, and the penalty recovered against the heir, he might resort again to this Court to have the whole thing reconsidered; which is now as proper for the judgment of the Court as it would be then. (157)

And so decreed, that if the personal estate fall short, upon payment of the arrears, and growing payments by the plaintiff, and upon his securing the annuity out of a sufficient part when he comes of age, the defendant *Rooke* be restrained from proceeding upon this bond at law. (q)

death, was to be postponed to debts by simple contract, and to the widow's customary part, but would bind the freeman's legatory part.

(q) *Vide Whaley v. Norton*, 1 Vern. 483. *Bainham v. Manning*, 2 Vern. 242. *Mathew v. Honbury*, 2 Vern. 187.
Spicer

Case 33.

Ibbetson versus Beckwith.

A testator's setting out (r) in his will to give and dispose of his worldly estate is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words *estate at* such a place, or *in* such a place, may carry a fee. The whole complexion of a will ought to be considered.

THOMAS Beckwith made his will in the words following, viz. "As touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise and dispose of the same, in the manner following; *Imprimis*, I give my estate, which I lately purchased of John Adamson, to pay and discharge all my debts. *Item*, I give and bequeath unto my loving sister Mary Beckwith, all my estate at *Helmehouse* in *Hither Dale* *Leasing* at *Crew*, and all my estate at *Cubeck*, paying and discharging all legacies before charged by my father's will. *Item*, I give unto my loving mother *all my estate at Northwith Close, North Closes*, and my farm held at *Roomer*, with all my goods and chattels as they now stand, for her natural life, and to my nephew Thomas Dodson after her death, if he will but change his name to Beckwith; if he does not, I give him only 20*l.* to be paid him for his life out of *Northwith Close, North Close*, and the farm held at *Roomer*; which I give her upon my nephew's refusing to change his name, to her and her heirs for ever."

Mr. Solicitor General and Mr. Fazakerley argued, that this was a fee simple in Thomas Dodson, the

Spicer v. Hayward, Prec. in Chanc. 114. Clarke v. Periam, 2 Atk. 333. Priest v. Parrot, 2 Ves. 161. Walker v. Perkins, 3 Burr. 1568, 1 Black. Rep. 517. S. C. Lady Cox's case, 3 P. Will. 340. Hill v. Spencer, Ambl. Rep. 641.

(r) *Sed vide* Denn lessee of Gaskin v. Gaskin, Cowp. 657, where, though the testator's intent appeared to be to give the whole interest in the estate devised by him, and had given a disinheriting legacy to his heir at l. v, the Court said they could not connect the presutory with the devising clause. So *Right v. Sidebotham, Dougl. 759*, where no stress is laid upon the introductory clause of the will.

testator's intent being to dispose of his whole estate; and there such construction should prevail as should make the whole to pass. That as this was his intent, so had he used words sufficient to carry the whole; three things only being necessary in wills to make the devise good, *viz.* The person described who is to take, the thing which is to be taken, and the interest which the party is to have in it; all which concur here: the words being sufficient to describe the person, the thing, and the interest which the party is to have in that thing. In wills the word *estate* (*s*) carries the whole interest the party hath; as was held in *Wilson and Robinson's* case, 2 *Lev.* 91. where the opinion of the whole Court was, that the words *tenant-right estate* were sufficient to pass the fee; although, as that case is reported, 1 *Mod.* 100. it seems to be the opinion but of two judges. So in *Norton and Lad's* case, 1 *Lutw.* 755. the words *whole remainder* were held to carry a fee, although one would think they would carry but an estate for life: but because the intent was manifest that a fee should pass by these words, it was held so accordingly. That the objection of a precedent estate being given (*viz.* to the mother) by the word *estate*, was idle: for, that as it was restrained to be but for life; and had the word *inheritance* been used instead of the word *estate*, with such a *restriction*, it would have passed but an estate for life. That the other parts of the will made his intent to pass a fee simple quite plain; as the provision that he should take the testator's name, and the limitation over to another, and her heirs for ever, upon his refusal to take the name, is a plain proof that he intended him a fee simple, not to be divested out of him, but upon his refusing to take the testator's name. And might well be compared to

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(*s*) *Right v. Sidebotham*, *Dougl.* 764, *vid.* also the signification of the word *estate*, in *Co. Litt.* 345. *sec.* 649.

Beachcroft (t) and *Beachcroft's* case, 2 Vern. 690. where the words *worldly estate* were held to pass a fee. *Barry* versus *Edgworth*, Abr. Eq. Ca. 178. and *Holden* and *Barker*; June 11, 1706. Devise of all his estate in *Mount Street*, adjudged to pass an estate in fee.

(159) Mr. *Attorney General* and Mr. *Verney* insisted on the other side, that *Thomas Dodson* took but an estate for life; it being a known rule, that an heir was never to be disinherited but by express words, or by necessary implication; and there could be no necessary implication where the words were capable of being taken in two senses; as they are in the present case, where it is natural to take the words in that sense, which is used by people in common parlance, rather than in the strict legal sense. This will was drawn by the testator himself, who appears not to have been very knowing in the legal signification of the words. Now the word *estate* does, in common speech, imply only the personal possession; as when it is said, that a man has an estate, by that is meant land, houses, &c.

The clause of his changing his name, is rather a proof that he intended him but an estate for life; for, it is usual in all such clauses to provide that not

(t) *A.* begins his will with disposing of all his *worldly estate*; and then wills that all his debts be first paid, and gives his wife a moiety of what is left after his debts paid: the question was, Whether a moiety of the real estate after debts paid, passed to the wife, or only half of the personal estate: *per cur.* my *worldly estate* comprises as well real, as personal: his *worldly estate* comprises all he has in the world. Without doubt those words subjected his real estate to the payment of his debts, and consequently a devise of a moiety of what is left, after debts paid, must comprise all that was liable to the debts; and therefore, decreed a moiety of the surplus of the real and personal estate to the wife.

only the first taker, but likewise every heir shall take the testator's name; and that upon any of their defaults the estate shall go over: but here is no provision for the heir of *Thomas* taking the testator's name; which looks as if he intended *Thomas's* estate to determine with his life. A gift of one's inheritance for life will give to the devisee but an estate for life; because the word *inheritance* being restrained to the term of a life, can mean only a description, and not the continuance of the thing given; and where after such limitation the remainder is given over to another, the remainder-man takes a fee; because the word *inheritance*, where not restrained by others, can mean only a fee, which the word *estate* does not; and therefore very different from the present case. His intent appears farther from difference of his expression in this clause, and in that whereby, upon failure of taking his name, he limits it by express words, *to her and her heirs*: which diversity of expression proves a difference of intention in him. Indeed in some cases the devisee may have a fee simple, not from the words, but from the purposes for which he takes, which require a continuance of the estate; as in this very will, the clause whereby he devises several lands to his sister, paying his legacies, gives her a fee: but in the devise to *Thomas* there is no particular purpose to make that construction requisite; nor is there any other clause in all the will which has a devise over but this one. *Wilson* versus *Robinson's* case, 2 *Lev.* 91. is scarcely intelligible as the case is there stated; the misfortune of most of the modern books being, that they run to the argument and resolution before they have well stated the case, leaving us often to judge of the case by the arguments: besides the words *tenant right*, which were used in that case, are of a particular signification. *Burdet* versus *Burdet*, in 1732, is within the rule of passing a fee, because of the devise for payment of debts. In *Norton's* and *Ladd's* case, 1 *Lutw.* 755, the words *whole remainder*, which were there

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used, ousted any notion of an estate for life only. And in *Beachcroft* and *Beachcroft's* case (2 Vern. 69c.) there being a precedent charge upon the inheritance for payment of his debts, the devise of the moiety of what was left must necessarily carry the inheritance. The distinction taken in *Barry* and *Edgworth's* case, *Abr. Eq. Ca.* 178. between a devise of all his estate *in* such a place, and *at* such a place, which latter (says the book) will carry but an estate for life, is an express authority for the defendant, that but an estate for life passes by this will; the words here being the same as if he had put in the word *at*. (*Sed per Lord Chancellor*, I remember that case very well, and no such distinction was made in it as is pretended by the book). And another strong authority for the defendant is *Wilkinson's* and *Merryland's* case, *Cro. Car.* 447. 449. and 1 *Ro. Abr.* 834, held but an estate for life.

(161) *Lord Chancellor.* The question turns entirely upon the construction of the words of the will, what interest was intended to *Thomas Dodson*, whether an estate for life, or in fee? In order to come at the testator's intent, the whole complexion of the will has been very properly taken into consideration on both sides; and it has been said, that the first words, *worldly estate*, were used only to shew, that what he was then doing was *animo testandi*; but not intended by him to reach to the whole of his estate. As to that I am of opinion, that these words prove him to have had his whole estate in his view at that time. Indeed he might have made but a partial disposition; but if the will be general, and that taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm; they shall be taken in that sense which is most likely to be agreeable to his intent of disposing of his whole estate. If therefore *Thomas* takes an estate in fee, the will will be perfect, and take in the whole; whereas, if he takes but an estate for life, one moiety

moiety will, after his death, descend upon him as heir at law, and the other moiety to the other co-heirs. The clause whereby the estates are devised over to his mother and her heirs, in case *Thomas* should refuse to take his name, hath been argued as a proof of his intending him but an estate for life; but that depends upon the construction of the word *estate*, which will be clear from the sense he hath taken it in through all the other parts of this will, whensoever he hath used it, he has meant thereby to pass the inheritance.

It hath been said indeed, that in those clauses the fee doth not pass from the force of the words, but from the nature of the purposes, *viz.* that of paying debts, &c. but still the words are an argument that he intended to pass the inheritance, though not the whole argument. It has been said likewise, that the word *paying* does not of itself impart a fee; but still, in what sense hath he used the words *my estate*? to pass the inheritance. As for example; the word is left out in the clause now in question; which is a very material and a very operative word: but yet none will pretend that this clause should be expunged by reason of the omission of that single word. Then the next words are, *all my estate, Northwith Close, North Close, &c.* without either *in* or *and*; which is likewise very imperfect: so that it must return to the words, *all my estate to my mother for life, and to my nephew Thomas Dodson after her death.* Now although the word *estate* may, in common speech, not mean an inheritance; yet it is clear he has meant it so here: and then taking it in that proper legal sense it will be a complete disposition of the whole: whereas, taking it to carry but an estate for life, there will be a chasm, an incomplete disposition; since half must descend to this very *Thomas*, and the other half to the other co-heirs, as hath been before observed. In the coun-
tels of *Bridgwater* and *Duke of Bolton's* case, 1 *Salk.* 236, *Abr. Eq. Ca.* 178. the devise of all his real

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estate *in* or *at* (I do not rightly remember which) *such a place*, was held to pass a fee. And I do not think there is any difference between the words *at* or *in*; they, in my opinion, mean the same thing: the case of *Wilson* versus *Robinson*, 2 *Lev.* 91. and of *Burdet* versus *Burdet*, in 1732, are very strong authorities for the plaintiff; in the first of which the fee was held to pass by the words *tenant-right estate*; and the latter was a devise of his particular estates at such and such a place; which was held likewise to pass the inheritance. Nor did the provision in the end of that case, for payment of his debts, influence the construction; but it was decreed upon the force of the first words. The same resolution was in that of *Barry* and *Edgworth*, *Abr. Eq. Ca.* 178. (u) All which are so many express authorities that the word *estate* carries a fee: nor hath any case been cited to warrant the altering the known legal signification of it. An objection indeed hath been made from the nature of the limitation; and it hath been said, that although the word *estate* might in other cases carry a fee, yet it could not do so here, because applied, in the first instance, to an *estate* for life only; and therefore was intended but as a description of the thing intended to pass: but that objection hath no weight in it; for, although he gave it particularly to his mother in the first place, yet the devise to his nephew is in general words; and I cannot see that the limitation for life, in the first instance, where the second limitation is general, can make any difference. Another objection has been made, that had he intended him an estate of inheritance, he would have given it him in the same words as he has limited it over upon his default of his taking his name: but this wording is so incorrect, that I think no great stress can be laid upon it. What weighs with me, is the intent

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(u) 2 *P. Will.* 524. S. C.

plainly

plainly appearing to pass the inheritance; as is manifest from the other clauses of the will. Indeed as to the other lands, wherein the testator had not a fee, the words *my estate* pass only such an interest as the testator had; if a fee, then a fee; if but a chattel, then that only; the operation of the words being according to the estate the testator hath in what he devises.

And so decreed (x) an estate in fee to *Thomas* the nephew. (y)

(x) Note, the *Master of the Rolls* held that *Thomas* the nephew took only an estate for life; but Lord *Talbot* varied the decree at the Rolls, and was of opinion *Thomas* had a fee. *Reg. Lib. A.* 1735. fol. 219.

(y) *Vile Bridgewater v. Duke of Bolton*, 1 *Salk.* 236. *Murry v. Wyse*, 2 *Vern.* 564. *Prec. in Chanc.* 264. *S. C.* *Chester v. Painter*, 2 *P. Will.* 336. *Barry v. Edgeworth*, 2 *P. Will.* 523. *Tanner v. Morje*, post 284. *Goodwin v. Goodwin*, 1 *Vesf.* 226. *Tufnell v. Page*, 2 *Atk.* 37. *Ridout v. Pain*, 3 *Atk.* 486. *Roe v. Blackett*, *Cowp.* 235. *Hogan v. Jackson*, *Cowp.* 299. *Loveacres v. Blight*, *Cowp.* 382. *Gaskin v. Gaskin*, *Cowp.* 687. *Frogmorton v. Wright*, 2 *Black. Rep.* 889. *Stiles v. Wulford*, 2 *Black. Rep.* 938. *Goodright v. Allen*, 2 *Black. Rep.* 1041. *Right and Sidebotham*, *Dougl.* 789. *Maccree v. Tall*, *Ambl.* 181. *Ho'dfast v. Martin*, 1 *Term Rep.* 411. *Fletcher v. Smiton*, 2 *Term Rep.* 656.

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9 Geo. II. 1

IN CURIA CANCELLARIÆ.

Sir John Robinson versus Comyns. (z)

Case 34.

7 February.

A. devises land to B. and his heirs, to the use of B. and his heirs, in trust to pay debts, and afterwards in trust for his grand-daughter C. (late wife of the plaintiff) and the heirs of her body, remainder to B. in fee, upon condi-

tion that he marry C. and gave him his personal estate in trust for C. until she attain full age; and made B. executor, and died. C. refused to marry B. and marries the plaintiff; and at full age she and her husband suffer a recovery of the premises. The condition of the devise in fee to B. is dispensed with by the lady's refusal; but then that remainder is well barred by the recovery, without a fine, though the bargain and sale, whereby the tenant to the *præcipe* was made, were not inrolled till after the recovery was completed.

ROBERT *Sheffield* being seised of a real estate, and possessed likewise of a considerable personal estate, by will devised all his lands unto the defendant and his heirs, to the use of the defendant and his heirs, in trust for payment of his debts, and afterwards in trust for his grand-daughter *Mary* (the plaintiff's late wife) and the heirs of her body, remainder to the defendant *Comyns* and his right heirs, upon condition that he should marry the testator's grand-daughter; and gave him likewise his personal estate in trust for *Mary* until she should attain her age of twenty-one, and made the defendant his executor, and died soon after. The defendant brought a bill for perpetuating of testimony of the witnesses to the will; and in his bill, reciting the clause in *Robert Sheffield's* will, declared

(z) 1 Atk. 473. S. C.

himself

himself ready and willing to marry the young lady; but she, by her answer, set forth her absolute aversion to the match, and utterly refused to have him; and soon after marrying the plaintiff, she and her husband (after she had attained her age of twenty-one) made a bargain and sale to J. S. in order to the suffering a common recovery; wherein her husband and she were vouched, and the uses thereof were to the issue of the marriage, remainder to her own right heirs; the lady died, leaving issue by the plaintiff two children; who set forth their right under the deed and marriage settlement, and insisted upon the defendant's remainder being barred by recovery.

This bill was brought against the defendant to have a conveyance according to the uses declared in the recovery.

Lord Chancellor. The first question is, what sort of estate the remainder in *John Comyns* is? Whether it be a trust, or a legal estate? It is observable, that the whole estate is given to the defendant and his heirs, to the use of him and his heirs; which is a complete disposition of the whole legal estate; and being in case of a will, would be so of the equitable interest likewise, unless the testator's intent appears to the contrary, as in this case it manifestly does; for, it is given in trust for payment of his debts, &c. and so far is a limitation of an equitable estate, the remainder of which (had the testator gone no farther) would, after the purposes served, return to the heir at law; as was determined upon Serjeant *Maynard's* will. But then there comes a remainder to the defendant and his right heirs, &c. It is true that the word *remainder* (properly speaking) signifies only a continuance of the same kind of estate as is before limited, which here was only a trust estate: for, when the whole legal estate is disposed of, and part of the equitable interest likewise, there the remainder must be an equi-

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equitable remainder. In this case indeed it is not an absolute one, but conditional; which, when the condition is performed, will vest the estate in him; and if the condition be not performed, it will then descend to the heir: the testator therefore has considered it as an equitable interest. And yet it is likewise true, that this equitable interest, when vested in the same person with the legal one, must, as to some purposes, be considered as a legal interest.

Conditions precedent and subsequent, no technical words to distinguish them.

The next question is, whether the condition annexed to the defendant's remainder be a condition precedent or subsequent? And as to this, I am inclined to think it is a condition subsequent. There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either according to the intent of the person who creates it. In this case the precedent limitation was an estate tail in possession; and therefore why shall we not say, that as to this remainder likewise, it was the testator's intent to have it vest immediately in the defendant? The limitation is immediate, although the condition upon which it depends is subsequent. Whether the defendant hath broke the condition or not hath not been proved; but from his answer, and some other things that have appeared in the cause, I am inclined to think it now dispensed with; partly by the Lady *Robinson's* death, and partly by her declaration in her answer to the former bill, that she would not marry him; and therefore the defendant's interest is now become absolute.

Another question has been made, whether the interest of the Lady *Robinson* and her husband was barrable by a recovery? and if it was, whether it was well barred by this recovery without a fine? It has been said, that a legal and an equitable interest cannot be incorporated together; but that objection cannot affect this case; for, though the legal

legal and equitable estates cannot be incorporated, yet the testator hath not limited an equitable estate, and then the legal estate, but hath at first given the whole fee. It happens indeed that the last part of the equitable interest may be considered as merged by coming to one and the same person, who had the whole legal estate in him; but it would be hard, that by coming to the defendant, although not absolutely (for the heir might, upon the condition broken, have taken the equitable interest out of him) it would be hard, I say, that this should prevent their incorporation: I therefore think it an equitable estate in the defendant, as well as that which was in the Lady *Robinson*, and consequently that she and her husband had a power to bar it. Whether it hath been done in this case is next to be considered. (a)

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Equitable
estates bar-
rable by re-
coveries as
well as legal.

It hath been said, that a feme tenant in tail and her husband (b) cannot make a tenant to the *præcipe* without

(a) *Vide North v. Champenon*, 2 Cha. Caf. 63, 78. 1 Vern. 13. S. C. *Beverley v. Beverley*, 2 Vern. 131. *Botcler v. Allington*, 1 Bro. Cha. Rep. 73. *Sale v. Thornton*, Amb. Rep. 549. *Cruise upon Fines and Recoveries*, 241.

(b) Whatever doubts may have been formerly entertained whether a husband seised *jure uxoris* could make a tenant to the *præcipe* of his wife's land, for the purpose of suffering a common recovery, without the wife's joining him in a fine, it now seems to be a settled point that he can. Mr. *Cruise*, in his Essay upon *Fines and Recoveries*, p. 52, suggests that this doubt probably arose from an inaccurate statement in the report of Lord *Talbot's* argument upon that occasion, and states, from the authority of the late Mr. *Booth*, Lord *Talbot's* words to have been these: "If I should lay it down
" as a rule, that where the wife is entitled to an estate tail
" in possession, her husband and she could not make a te-
" nant to the *præcipe*, for docking of the intail without a
" fine, because the law is supposed to appoint no other
" method, by which a woman under coverture can convey
" her freehold but by fine, I should shake many of the com-
" mon

without a fine : but whatever may be the case where a husband is merely seised in right of his wife is not necessary for me to determine ; because in this case Sir *John Robinson* did, by his intermarriage, become intitled to an estate by curtesy ; and therefore he alone, without his wife's joining, might have made a good tenant to the *præcipe*. It has been also objected, that the bargain and sale, whereby the tenant to the *præcipe* was made, was not inrolled until the recovery completed : as to that, if the Lord *Hobart's* opinion, as cited some *Goldbolt's* reports, had been law, from judicial authority would certainly have followed it. If there be no inrolment, then the bargain and sale are void ; but if there be an inrolment within six months, then it is good by relation. (c)

And so decreed for the plaintiffs. (d)

See as to this point of relation *Hynde's case*, 4 Co. 70. b.

“ mon recoveries of the kingdom ; for whatever may have
 “ been the practice of some over-cautious conveyancers, yet
 “ I believe it hath often been held, that the husband alone
 “ may by deed only, and without any fine levied by the
 “ wife, convey a sufficient freehold to the grantee to make
 “ him tenant to the *præcipe*.” Mr. *Butler*, in a note on the
 first Institute, observes that Mr. *Booth's* statement of Lord
Talbot's argument is confirmed by a manuscript report of
 the case of *Robinson v. Camyns* in his possession. ^b *Vid.* also
Rolle's Abr. title *Recovery*, (a) pl. 4. *Pig. Treatise of Com.*
Rec. 72. whereby it is laid down that a husband, seised
 jointly with his wife, whether by moieties or entireties, or
 seised only in right of his wife, may create an estate of free-
 hold during the coverture, and thereby make a good tenant
 to the *præcipe*.

(c) For although the freehold does pass not from the bargainor until inrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed by relation. *Cruise upon Com. Rec.* 88.

(d) The principal question in this case seems to have been
 been

Adams versus Cole.

Case 35.
8 March.

JOH^N Lockyer, upon his marriage with Elizabeth Hody, gave a bond to two trustees, reciting, that whereas by the said marriage he the said Lockyer should be greatly preferred in riches and substance to the value of about 500*l.* and had agreed to pay her the yearly sum of 10*l.* to her sole and separate use, as well during the coverture as being sole, without any control from her intended husband; yearly payments to her separate use, that she may dispose of 100*l.* by will in his life-time; that if she survive, he is to leave her 200*l.* apparel, plate, &c. Part of her fortune was a bond of 200*l.* The husband dies, having made his will, and the plaintiff residuary legatee, but had not recovered the 200*l.* due on the bond; then the wife dies: this bond shall go to the representative of the husband, he being a purchaser of it by the settlement on her.

The husband upon marriage (in consideration of his wife's fortune, computed at 500*l.*) agrees to

been, whether the remainder to the defendant Comyns was to be construed as the remainder of a *legal* or of a *trust* estate: for if it was a remainder of the *legal* estate, the recovery suffered by the *cestui que trust* could not operate so as to bar the *legal* remainder; recoveries of that kind only operating on the *trust* estate whereof they are suffered, and the equitable remainders expectant thereon, but do not affect the *legal* estate. The Court considered the legal estate and use as having been wholly disposed of by the first part of the devise, and that no remainder could be in the defendant of that estate, which was clearly vested in him: but that as part of the *equitable* interest was likewise given to him, the remainder in question could be no other than an equitable remainder, which, if not disposed in the manner it was, would necessarily have resulted to the testator's heir at law. The intent of the testator, *viz.* "that the remainder should be considered as an equitable one," appeared manifest to the court, for he gave it on a condition, which would be entirely defeated, if the remainder of the *legal* estate was held to vest by force of the first devise.

and

and likewise that if she should die in his life-time, that it should be lawful for her to dispose, by will, of the sum of 100*l.* and all her wearing apparel, watch, rings, and jewels; and that in case she survived him, then he was to leave her the sum of 200*l.* and all her wearing apparel, plate, jewels, household goods, furniture, linen and woollen of all sorts, which she shall at her marriage be possessed of, to be at her sole disposal: and for the better securing the premisses, the said *John Lockyer* was upon request to settle lands of the yearly value of 12*l.* Now the condition of this obligation is, that if the said *John Lockyer* should pay the said sum, and should (in case of his surviving her) permit her to make such will; and if she survived him, would leave her the sum of 200*l.* and all her wearing apparel, &c. that she should be possessed of at the time of her marriage, that then this obligation to be void.

Part of the said *Elizabeth's* fortune consisted in a bond debt of 200*l.* given to her while sole; then the marriage takes effect; and *John Lockyer* the husband makes his will, and the plaintiff residuary legatee thereof, and dies, without ever recovering this bond debt of 200*l.* then his wife dies.

(169)

And the question was, whether this bond debt (being a chose in action, and never reduced into possession by him) should go to his representative, or to the representative of the wife, who survived her husband.

Mr. *Solicitor General* and Mr. *Clive* argued for the plaintiff, that although the husband hath by law no right to a chose in action belonging to the wife, unless reduced into possession by him during the coverture, according to 1 *Inst.* 351. *b.* yet that would not affect the present case, the husband here being a purchaser for a valuable consideration of all his

his wife's fortune, whether in action or possession, by force of the condition of his bond; and cited the case of *Meredith (e)* versus *Wynne*, *Abr. Eq. Ca.* 70. *pl.* 15. although, as the Court observed, that case is quite different from this; for, there the husband survived the wife. And *Packer (f)* and *Wyndham's* case, *Precedents in Chanc.* 412.

Mr. *Fazakerley* insisted on the other hand for the defendant, that the husband could not be considered as a purchaser, the article reciting that he should be greatly advanced to the value of 500*l.* and that if she survived he should leave her 200*l.* besides her wearing apparel: and should the plaintiff's construction prevail, then she should not have even so much as was her own; and the husband would be a purchaser, not with his own, but with her money: so that here is no consideration moving from the husband to the wife. And where-ever the Court takes an advantage from the wife, which the law gives her, it must be upon some advantage redounding to her from her husband's estate, of which there was nothing here. Had there been any dowable estate, she must have been indowed notwithstanding this bond, and therefore no reason to bar her of this legal advantage; according to the resolution in *Lister* and *Lister's (g)* case, 2 *Vern.* 68.

Lord

(e) *Prec. in Chanc.* 312, S. C. where the wife's portion, charged by will on certain lands, pursuant to a power in a settlement, was held to go to the administrator of the husband, and not to the administrator of the wife, they being both dead and the money not raised.

(f) In which case the wife's fortune, though the husband made no settlement upon her, was decreed to go to the creditors and representatives of the husband, and not to the representatives of the wife.

(g) Where the wife's fortune which consisted among other things of choses in action, and remained unaltered during her husband's life time, were held upon his death
not

Lord Chancellor. Most of the cases where *choses* in action have been decreed to the husband's representative (he dying in the life-time of the wife) have gone upon the reason of equality, there being a settlement made by the husband on his wife, whereby he became a purchaser of her fortune; and therefore on the one hand, as she was to have the provision made by the settlement, so on the other he should have her whole portion. In this case indeed there is no settlement of any estate by the husband upon his wife, only a provision, that in case she should survive him, then he should leave her 200*l.* and her wearing apparel, jewels, &c. So that it hath been truly said, that here is nothing moving from the husband; since the whole that she is to have will not amount to 500*l.* But still is not this the agreement of the parties? Had he reduced it into possession during the coverture, it had been his absolutely: nay, he might have released it during the coverture. Indeed had there been no agreement, the law which gives her the chance of survivorship must have taken place: but she hath waived that chance by her express agreement of having so much at all events; and his departure from that absolute right which the law gave him over the whole, either by reducing into possession this debt or by releasing it, is of itself a sufficient consideration; the consequence of his not having this 200*l.* would be, that he should be bound on the one side to leave her so much if she survived him, and she not bound at all. I think therefore that the husband's representative is intitled to this 200*l.*

And so decreed for the plaintiff. (*b*)

not to be liable to his debts, but the benefit thereof to survive to her, notwithstanding the husband had before his marriage settled a jointure upon the wife adequate to her portion.

(*b*) Upon the principle which governed the decision of this case, *viz.* "the express agreement of the parties," it seems

Fort versus Fort and Blomfield.

Case 36.

FRANCES Witherley being possessed of *South-Sea* stock and other stock, to the value of 2000*l.* by will dated the 14th of *December* 1732. devised some annuities, and subject to those annuities devised all the residue of her personal estate to *Bridget Fort* (the plaintiff) by the name of *Bridget Witherley* (her maiden name) and made her executrix of her will, and died: the plaintiff being sometime before the testatrix's death (but unknown to her) married

A. devises the residue of her personal estate, about 2000*l.* to *B.* by her maiden name (not knowing her to be married) most of it being *South-Sea*

Stock; her husband agrees to settle it in two trustees, in trust for husband and wife; and they transfer it to the trustees accordingly: there is a deed prepared, but not executed, as being objected to by the husband as not in pursuance of the agreement; and by letter he gives directions to prepare another: before that is done he dies; his wife administers; she shall have this *South-Sea* Stock, &c. in her own right, and not as administratrix to her husband.

to be generally admitted by a variety of determinations that a settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in his wife's life-time, to the whole of her *choses in action*; but if it is not made in consideration of her fortune, the surviving wife will be intitled to the *choses in action*, the property of which has not been reduced by the husband in his life-time; so if it is in consideration of a particular part of her fortune, such of the wife's *choses in action*, as are not comprized in that part, it has been said, survive to the wife, but that in all cases where a husband makes a settlement on his wife in consideration of her fortune, the wife's portion, though consisting of *choses in action*, and though there be no particular agreement for that purpose, shall be looked upon as intended for and purchased by him. *Blois and Martin v. Lady Hereford*, 2 *Vern.* 501. *Cleland v. Cleland*, *Prec. in Chanc.* 63. *Packer v. Windham*, *ib.* 412. *Co. Litt.* 351. *Hay.* ed. note (1). And Lord Hardwicke is reported to say, that where the settlement made by the husband previous to the marriage, has not been adequate to the wife's portion, the Court has notwithstanding decreed the husband to be entitled to her portion, 2 *Atk.* 448. in the case of *Lannoy v. the Duke of Athol*, *vid.* also *Garforth v. Bradley*, 2 *Ves.* 677.

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to Mr. *Fort*, who thereupon agreed with the defendant *Blomfield* to settle this 2000*l.* and put it into the hands of two trustees; one whereof to be nominated by him, and the other by his wife, in trust for husband and wife and the survivor: the husband and wife make a transfer of stock to the two defendants as trustees nominated by them both. *Blomfield*, the wife's trustee, draws a declaration of trust, and sends it into *Scotland* to *Fort* and his wife, to be executed by them; whereby this stock was to be settled upon the husband and wife for their lives, and for the life of the longest liver of them, then for the issue of the marriage; and if no issue, then for the wife, her executors and administrators: the husband refused to execute this declaration, apprehending that his wife would thereby be impowered to dispose of the stock during his life, in case they had no issue, and that she died before him; but by letter directed to the defendant *Blomfield*, he desired that the trust should be declared jointly for himself and his wife for their lives; and after their decease, then to their children, then to the survivor to take the whole: a declaration was accordingly drawn; but before it could be transmitted to the husband he died intestate without issue.

(172) And now the question was, whether the defendants should be looked upon as trustees for the wife as administratrix to the husband? (in which case the defendant *Fort* would be intitled to a moiety under the statute of distributions, he being father to her husband) or, whether they should be trustees for her in her own right?

Lord Chancellor. The testatrix has made the plaintiff executrix of her will, and residuary legatee thereof, by her maiden name, not knowing her to be married at that time; and it would be hard therefore to say this 2000*l.* did vest absolutely in the husband, notwithstanding the case, 3 *Lev.* 403. that hath been cited; especially in the present case, where

where she is made executrix, and consequently chargeable with debts. But without entring minutely into the kind of right which the husband had to this stock, whatever it was, he had it singly through his wife, subject to the several agreements made for settling this stock; and it was very reasonable that it should be settled, the husband having made no settlement upon her. The first agreement between the husband and *Blomfield* was, that it should be settled so, as if they had no issue, the survivor of the husband and wife should take the whole, and that it should be put into the hands of two trustees, to be nominated by the husband and wife; who accordingly make a transfer of the stock to the two defendants as their trustees; then comes the declaration of trust drawn by *Blomfield*, and therein a new scheme of turning his money into land, which was never thought of before, and the proviso about the survivorship not at all observed; but instead thereof it is expressly said, that in case there be no issue of the marriage, it shall be to such uses as the wife shall direct: this declaration the husband positively refuses to execute, but by a letter to *Blomfield*, proposes to have it settled according to the agreement, that is, that neither he nor his wife shall have power to dispose of it, but that it should go to the survivor; upon which another declaration of trust is drawn, but the husband is prevented by death from executing it, having before declared, that which of the two survived should have the whole; which shews his intention of continuing in his former resolution; and nothing appears to shew any alteration of it. Taking it therefore in that light, I must consider the defendants as trustees, not only for the husband, but for him and his wife; otherwise, what necessity was there for their being nominated on both sides? it being antecedently agreed upon what terms this stock should be settled; the agreement was complete on both sides, and the subsequent transfer of the stock to the trustees must be taken in pursuance of that agreement; and not to convey away all the

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wife's right, which was settled by the precedent agreement to which this transfer relates, and is a completion of. I am therefore of opinion, that upon her surviving her husband, this stock is become her sole and absolute property.

And so decreed the defendants to be trustees for the wife in her own right.

*See addenda * 295*

Case 37.

Heard versus Stanford.

The husband as such, is not chargeable in a court of equity any more than at law, with the debts of his wife after her decease; not even though he had a large fortune with her; as on the other hand he is, during the coverture, liable to all her debts, although he did not get a

THE defendant's wife, before marriage, gave a promissory note for 50*l.* to the plaintiff, in consideration of five years service, at the rate of 10*l.* *per ann.* and afterwards married the defendant, who had a fortune with her to the amount of 700*l.* part whereof consisted of things in action, some of which the defendant received as husband, and the rest he took as administrator to his late wife. The bill was for the payment of this note, upon suggestion of his having received a great fortune with her, and never having made any settlement upon her. The defendant insisted, that that part of his wife's fortune which was not reduced into possession by him during the coverture, and which he received after her death as administrator, was not near sufficient to pay her debts; and that he had already paid more than that part amounted to.

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The question was, whether the husband should be liable in equity to the payment of his deceased wife's debts; and the fortune he had received with her should be looked upon as equitable assets? it being clear, that at law he is chargeable only during the coverture, and no longer.

For the plaintiff was cited the case of *Freeman versus Goodham*, 1 *Chan. Ca.* 295. where, upon a bill

bill brought against the husband for discovery of goods bought by the wife before marriage, which after her death came to his hands, the Lord *Nottingham* said, he would change the law in that point. And also that of *Powell* versus *Be'l*, *Abr. Eq. Ca.* 60. pl. 7.

Lord Chancellor. The question is, whether the husband, as such, be chargeable for a debt of his wife's after her death in a court of equity? As on the one hand the husband is by law liable to all his wife's debts during the coverture, although he did not get one shilling portion with her, and that her debts should amount to 2000*l.* or any other sum whatever; so on the other hand it is as certain, that if the debt be not recovered during the coverture, the husband is no longer chargeable as such, let the fortune he received with his wife be never so great. The case perhaps may be hard, but the law hath made it so, that it may be equal on both sides, as well where the husband is sued during the coverture, for a debt of his wife's, with whom he had no fortune, as where he by her death is discharged from all her debts, notwithstanding any fortune he may have received in marriage with her; so is the law, and the alteration of it is the proper work of the Legislature only. There are instances indeed in which a court of equity gives remedy where the law gives none; but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up where the law leaves it, and extend it farther than the law allows. Besides, if relief was to be given in this case, it would be very unreasonable not to extend it to the former case, where the hardship lies on the husband, which was never yet done. There is a case which may, and probably does happen very often, that comes very near to this. Suppose goods are sold for a certain price to a person, who just after the delivery, and before the price paid, becomes a bankrupt, and these

Where the law provid
a particular
remedy, to
extend it is
the province
of the legisla-
ture, but not
of the courts
of equity.

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very goods are vested in the assignees; the vendor can come in but as a creditor for his share; and can neither pretend to have the price agreed, nor pursue the goods in the hands of the assignees; and yet this is a hardship upon him, but not such as is relievable here. In the case of *Freeman* versus *Goodham*, the goods never came to the husband's hands until after the wife's death; which made it a very hard case upon the creditor, and probably occasioned the saying of my Lord *Nottingham*: but even there he only over-ruled a demurrer, put into a bill for a discovery of the goods; and it does not (i) appear what became afterwards of the cause. And in that of *Powell* versus *Bell* the wife was administratrix of her first husband, and it did not appear what

(i) In 3 *P. Will.* 411. note (b), the case of *Freeman* v. *Goodham*, and the proceedings therein are thus stated; "Upon searching the Register Book, it appears that in the case of *Freeman* v. *Goodland* & c. cont. (not *Goodham*) the defendant had married the testator's widow, who had bought goods of the testator's executors; that after the widow's death, the executors bringing their bill (*inter al*) to be satisfied of these goods, the defendant demurred; which demurrer was on the 18th *December* 1676, over-ruled by the *Lord Chancellor*; that afterwards on the hearing of the cause the 2d of *December* 1678, the defendant insisted that his wife had a property in these goods at the marriage, which were part of her portion; but nevertheless to avoid further trouble, and in case an assignment of some leasehold estates mentioned in the cause were made to him (though he was not liable by law so to do) yet, by his counsel he offered to pay for the goods," whereupon the decretal order runs thus; "That the defendant *Goodland* do pay to the said executors the sum of 350*l.* reported due to them on account of the said goods, according to his offer aforesaid." So that there being a decree in consequence of the defendant's offer, here appears to be no express determination in the point; however it is very probable that the defendant perceiving which way the opinion of the Court inclined on arguing the demurrer, was induced to make the abovementioned offer.

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she had in her own right, and what as administratrix of her husband; in which case the marriage is no gift in law of the goods which she hath in *auter droit*: and upon this reason only are founded all the cases where a surviving husband has been charged with his wife's debts after her death.

And so decreed an account of what the husband had received since his wife's death as her administrator; and that he should be liable for so much only: but as to any further demand against her dismissed the bill. (k)

Streatfield versus Streatfield.

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Case 38.

THOMAS *Streatfield*, the plaintiff's grandfather, by articles previous to his marriage, May 31, 1677. agreed to settle lands in *Sevenoake* to the use of himself and *Martha* his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said *Thomas* on his wife begotten, with other remainders over. The marriage soon after took effect, and by deed, dated April 5, 1698. reciting the foresaid articles, he settled his lands at

The ancestor by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of

the marriage, in the usual manner. He makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son settles other lands, in consideration of this last marriage, in the usual manner; and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders; and with direction, out of the profits, to educate the grandson; and to place out the rest of the profits, to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to his said daughters, their executors, &c. The grandson is not to be bound by the deed, which did not pursue the articles; but then he shall make his election when he comes of age; and if he chooses to take lands, which ought to have been settled, the daughters (his aunts) shall be reprimed out of the lands devised to him.

(k) 3 *P. Will.* 410, S. C. The Earl of *Thomond* v. Earl of *Suffolk*, 1 *P. Will.* 470. S. P.

Sevenoake to the use of himself and his wife for their lives, and the life of the longest liver of them (without impeachment of waste during the life of *Thomas*) and after their decease, to the use of the heirs of the body of the said *Thomas*, on the said *Martha* to be begotten, and for want of such issue, remainder to the right heirs of *Thomas*. They had issue *Thomas* (their only son) and two daughters, *Margaret* and *Martha*. In the year 1716, upon the marriage of *Thomas* the son, the father settled other lands (of which he was seised in fee) of the yearly value of 345 *l.* to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise 2000 *l.* for younger children. After the son's death, *Thomas* the father, in the year 1721. levied a fine of the lands comprised in the deed of 1698. to the use of himself in fee, and in the year 1725. made his will, and thereby devised part of those lands to his two daughters *Margaret* and *Martha*; "And also all other his manors, messuages, lands, tenements and hereditaments whatsoever, either in possession, reversion or remainder not therein before given or disposed of, situate in the counties of *Kent*, *Surrey*, or elsewhere, to trustees, in trust for the plaintiff *Thomas* his grandson for life, remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to *Margaret* and *Martha*, with several remainders over:" [then comes this clause] "And my will and meaning farther is, and I do hereby authorise and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson *Thomas*, so much as they shall think fit during his minority; and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates; which said monies, with interest arising therefrom, my will is, be paid to my grandson *Thomas* at his age of twenty-one years, if he so long live; or, in case he dies before

fore

“fore that age, then that the same shall be paid to
“my two daughters *Margaret* and *Martha*, their
“executors, &c.” The testator died in the year
1730.

The question was, whether the settlement in 1698.
was a proper execution of the articles of 1677? and
if not, whether the general devise to the plaintiff
should be taken as a satisfaction for what he was in-
titled to under the articles of 1677?

Mr. *Solicitor General*, Mr. *Brown*, Mr. *Fazaker-
ley* and Mr. *Noel* argued for the plaintiff, that al-
though in a will or articles executed, *Thomas* the
grandfather would have been tenant in tail, yet the
articles of 1677. being but executory, this Court
would interpose, by carrying them into execution in
the strictest manner, and not leaving it in his power
to destroy the uses as soon as raised. That accord-
ing to that rule the deed of 1698. was certainly no
execution of the articles in equity; for, though it
was in the very words, yet did it not at all answer
the intent of the articles, and came therefore within
the rules of *Trevor* and *Trevor's* case, *Abr. Eq. Ca.*
387. (1)

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That the settlement in 1716. upon *Thomas* the
son's marriage (although it was of lands of greater
value than those contained in the articles) could
never be thought a satisfaction for them, there being
no reference at all in it to the articles, and it being
made only in consideration of the son's marriage, and
for settling a jointure upon his wife, and making a
competent provision for the issue; all which are new
considerations no way relative to the articles: and
where there is an express consideration mentioned in
a deed, there can be no averment of another not
contained therein.

(1) 1 *P. Will.* 622. S. C.

That

That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done, was held in *Lechmere* (m) and Lady *Lechmere's* case. But in this case *Thomas* the son was by the articles to have been tenant in tail; but by the settlement 1716. he was to be but tenant for life; which was giving him a less estate for a greater, and consequently not to be deemed a satisfaction without a special acceptance of it as such, according to the rule in *Pinnel's* case, 5 Co. 117. where it is held that payment of a lesser sum can never be a satisfaction for a greater, unless upon a special circumstance shewing the intent; as payment at an earlier day, &c. That the will could no more be taken for a satisfaction than the settlement, and upon the same reasons; for, by it the plaintiff is no more than tenant for life, and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one, and then to be paid to him; but if he dies before that age, they are given away to the testator's daughters; and when he does arrive to that age, he is to be but barely tenant for life, and even not that without impeachment of waste; besides, if the will be construed a satisfaction as against the plaintiff, so it must likewise be as to all the others claiming under the articles; whereas the plaintiff's sisters, who were intitled under the articles, can never take anything under this will, but are wholly excluded.

The general devise of all his manors, lands, &c. in possession, reversion or remainder, will not alter the case; for, where the testator hath estate sufficient to satisfy such general words, he shall never be construed to have intended to pass that which he had no right to dispose of, and the giving of which would work a wrong. That he had no right to dispose of

(m) *Ante* 80.

the lands contained in the articles is evident from what hath been already said: and had not this been upon his own marriage, but in any other settlement, he had been a trustee for his son, and then had made his will in the same words that he hath done here, surely that trust-estate would never have passed; and there is no difference whether the trust be expressed, or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. *A grant of all one's goods* will not pass those which he hath in *auter droit*: so if he had had a mortgage in fee, such general words would not have passed it from the devisee of the personal estate, to the devisee of the land. In *Rose (n)* and *Bartlett's case*, *Cro. Car.* 292. a general devise of *all his lands and tenements*, having both freehold and leasehold, was held to pass the freehold lands only. And in *Harwood and Child's case*, heard by the present *Lord Chancellor*, *March* 18, 1734. a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can the cases of *Duffield versus Smith*, 2 *Vern.* 250. *Noys versus Mordaunt* 581. be objected; for, in the former the decree was reversed, upon account of the

(n) The authority of which case has been referred to, and acknowledged in *Day v. Trigg*, 1 *P. Will.* 286. *Davis v. Gibbs*, 3 *P. Will.* 26. by Lord *Hardwicke* in *Chapman v. Hart*, 1 *Ves.* 271. *Knotsford v. Gardiner*, 2 *Atk.* 450. Also in *Pistol v. Richardson*, in *B. R. Hill. Term* 1784 (reported by Mr. *Cox* in his note (1) upon *Addis v. Clement*, 2 *P. Will.* 459). *Sed vide Turner v. Huffer*, 1 *Bro. Cha. Rep.* 79, in which case Lord Chief Baron *Eyre* (in the absence of the *Lord Chancellor*) though reported to say, he did not mean to deny the authority of *Rose v. Bartlett*, determined, that by a devise of lands, tenements and *tythes*, (the testator having *tythes* in fee, and likewise *tythes* by *leases perpetually renewable*) the leasehold as well as the freehold *tythes* passed.

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sister's being heir at law, and disinherited; which is the present case: for, here they would take a beneficial interest from the plaintiff, who was heir at law to his grandfather, and give him but a very small one in its room; and in the latter case, the father being tenant in tail of part, had power to bar it by fine; in which respect he might well be looked upon as a proprietor of the whole: but if he be decreed to make his election, it must be done presently, for then it is that he is to take: whereas he cannot by law make his election, being but an infant; and if so, the Court must compel him to that which the law disables him from doing.

Mr. *Attorney General*, Mr. *Strange* and Mr. *Peer Williams* argued for the defendant, that this Court will not, in all cases whatever, decree a specific performance; but would, in some particular cases, leave the party to his remedy at law upon the covenant; that these articles were made so long ago as in 1677. and *Thomas* the son, who was the person intitled to have them carried into execution, lived until 1722. Forty-five years after, without ever desiring to have them executed; and that the intent of those articles did not seem to go any farther than the settling the jointure on the wife, and the making *Thomas* the grandfather tenant in tail, the words being *to provide for the wife*, but no mention made of the issue; but whoever comes into equity must do equity; and therefore if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which gives him an estate upon a plain supposal that he shall take nothing by the articles; but shall never be at liberty to take a great benefit under the will, and waive that part which makes against him, to the prejudice of a third person: the whole will must be acquiesced under, or no part of it at all, according to the resolution in *Noy's* and *Mordaunt's* case; which went upon the reason of an intire compliance with the testator's intent in taking intirely under the will,

will, and not upon the supposed reason of his being proprietor, by having it in his power to levy a fine. The like resolution was in the case of *Hearne versus Hearne*, (o) 2 Vern. 555. in that of *Cowper versus Cotton*, February 16, 1731. at the Rolls; where a freeman of London devised his estate to trustees for the raising 6000*l.* for his four daughters, and made a disposition of the surplus, and held that they should stand either by the will or by the custom, and if by the former, that they should not defeat the devise over. That in cases where general words in a will had been restrained from passing all which the testator had, it hath been upon the testator's intention manifestly appearing in the will it self, not to pass so much as the generality of his words would comprehend; but in the present case, his intent plainly appears to pass all: nor will that intent be satisfied by saying, that he had a reversion of the lands comprised in the articles; since he would have been tenant in tail under the articles, and only for life under the will.

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Lord Chancellor. It cannot be doubted, but that upon application to this Court for the carrying into execution the articles of 1677. the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul every thing he had been doing: and the nature of the provision is strong enough for this purpose, without any express words; and I must therefore consider what was the operation of the deed of 1698. which is declared to be in perform-

(o) Where *A.* by marriage articles agrees to leave his wife 800*l.* and her jewels, &c. but it is declared that notwithstanding the articles she should not be debarred of any thing he should give her by will. *A.* by will makes a disposition of his whole estate, and gives his wife 1000*l.* decreed, the wife must either waive the articles, or the will, and not claim the benefit of both.

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ance of the true intent and meaning of the articles. If it be so, all is well; but if it be not, it only shews that the parties intended it so, but were mistaken. So was the case of *West v. Erissey*, where the articles were by the *House of Lords* decreed to be made good; and the same must be done in this case, if nothing intervenes to prevent it. The settlement in 1716. whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles; but to me it appears neither an actual satisfaction, nor to have been intended as such. The grandfather had done that in 1698. which he apprehended to be a satisfaction for the articles; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration intirely new, the limitations being intirely different; and therefore it would be absurd to call this a satisfaction for another thing it hath nothing to do with, and to which it is no way relative. The next thing to be considered is, the fine levied of the lands in question in the year 1723. by the grandfather: the intent whereof was, to have the absolute ownership of those lands in him: and one reason why no application hath been made till now, to have those articles carried into execution, might be, that during the grandfather's life no body was intituled to any thing in possession under them. Then comes the will in 1725. whereby he gives part of those lands settled in 1698. to his daughter; thereby shewing his apprehension to be, that by a fine he had given himself a power of disposing of them: and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles. The next thing is the devise to the trustees for his grandson the plaintiff, upon his attaining the age of twenty-one; and the question here is, whether the general words shall ever pass lands not capable of the limitation in the will? And to that have been cited.

cited *Rose* and *Bartlett's* case, *Cro. Car.* 292. and other cases; but they cannot influence the present case: for, the testator had legally a power to dispose of those lands; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conuzance, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands*; for, there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other; I therefore think his intent was clear to pass these lands by the will; and if so, we must now consider what will be the effect of this will. If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases; but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take intirely, but not partially under it; as was done in *Noy's* (p) and *Mordaunt's* case: there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made. So are the several cases that have been decreed upon the custom of *London*. The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and if after, then

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(p) 2 *Vern.* 581. S. C. where *A.* having two daughters *B.* and *C.* devises fee simple lands to *B.* and lands which were settled upon him in tail, to *C.* Held, if *B.* will claim a share of the intailed lands under the settlement, she must quit the fee simple lands, for the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition they should release to each other.

but

but an estate for life; and that he appears before the Court in the favourable light of being heir at law: but this will not alter the case. The estates which the testator has given him were undoubtedly in his power; he hath given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir at law; and surely it is as much in the power of the Court to make this bequest, thus limited, to be a satisfaction, if the party will stand to the will, as in the other cases. Indeed if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles; but that is because nothing is left them by the will; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is intitled to a large and ample provision by her marriage settlement: nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, *viz.* nieces, at the same time that the mother (who hath an ample provision) would be left at large, and under no tie of maintaining her own children.

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And so decreed the plaintiff to have six months after he comes of age to make his election, whether he will stand to the will or the articles? And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to *Margaret* and *Martha*, to be conveyed to them in fee. (q)

(q) In this, and many other cases of the same nature, the Court of Chancery has directed upon a principle of re-

Warrington versus Norton.

Case 39.

A Commission of bankruptcy was taken out against one *Hughes*, and upon the 9th of *February* 1730. at eleven o'clock in the morning the commissioners met, and proceeded to declare him a bankrupt, and the declaration was signed by them between three and four o'clock in the afternoon, and the assignment of the bankrupt's goods executed at six; at which instant the commissioners had notice that the bankrupt died that day at one in the afternoon; which was the first notice they had of his death. The bankrupt having before his death devised all his real and personal estate for the payment of his debts, the plaintiff, who was a creditor, brought his bill against the defendant as assignee under the commission, for an account of such goods of the bankrupt as had come to his hands; to which the defendant pleaded the commission and the proceedings under it. The question was, whether this was such a *dealing* under the commission as was within 1 *J.* 1. *cap.* 15. *sect.* 17. the words whereof are;

A commission of bankruptcy issues against *H.* at eleven o'clock in the morning; at three in the afternoon the commissioners declare him a bankrupt, and execute an assignment at six, and then have notice that he died at one o'clock that day; this a *dealing* within the act of parliament, and the proceedings shall stand.

gard to the end and consideration of the settlement, and the intent of the trusts, as the same were in the original contemplation of the parties: and accordingly in the decreeing the execution of marriage articles or trusts in strict settlement (where the articles by *legal* construction give an estate of inheritance to husband and wife) the Court has been necessarily obliged to have recourse to a construction beyond the *legal* operation of the words, in which the articles or trusts are expressed. *Jones v. Laughton*, 1 *Eq. Cas. Abr.* 392. pl. 2. *Trevor v. Trevor*, 1 *P. Will.* 622. *Cusack v. Cusack*, 1 *Bro. Parl. Cas.* 470. *Nandick v. Wilkes*, 1 *Eq. Cas. Abr.* 393. c. 5. *Honor v. Honor*, 1 *P. Will.* 123. *Roberts v. Kingsley*, 1 *Ves.* 238. *Legg v. Goldwire*, ante 20. *Burton v. Hastings*, *Gilb. Eq. Rep.* 113. *West v. Eriffey*, 2 *P. Will.* 350. *Hart v. Meddlehurst*, 3 *Atk.* 371. *Powell v. Price*, 2 *P. Will.* 535.

R

" That

“ That where after any commission of bankruptcy is
 “ dealt in by the commissioners, the offender happen to
 “ die before distribution, that nevertheless they may
 “ in that case proceed in the execution of the com-
 “ mission in such sort as they might have done if
 “ the offender was living.”

(185)

Mr. Attorney General, Mr. Fazakerley and Mr. Forrester argued for the defendant, that the meeting in order to declare him a bankrupt, was a sufficient dealing within the statute; and that the assignment hath a relation to the bankruptcy; that when the commissioners assign, it is from the act of parliament, and not from themselves; for, they have no interest vested in them; but it is the operation of the act which gives them right in the thing, but none at all in the person of the bankrupt; so that his death cannot be material: and the law giving no right over the person, but only a power of calling him a bankrupt, it must be in pursuance of the commission, and therefore that examination was a dealing within the statute; that by law there can be no splitting a day; as a lease made to commence from *henceforth*, takes in the day of the date, although executed at the very last moment: and in *Shelley's case*, 1 Co. 93. the recovery was held good, although the party died the same day, because it was a legal proceeding. That the laws against bankrupts were not at all to be considered as penal, but as remedial laws, and as such were entitled to the most favourable construction, according to the rule laid down in *Heydon's case*, 3 Co. 7. And therefore if any construction could be made more beneficial for the creditors than another, that one was to be admitted as founded upon natural justice, and upon that best of rules, *jus suum cuique tribuere*; that in these cases the law it self hath provided how it shall be construed; for, by 21 J. 1. cap. 19. sect. 1. it is enacted, that all the statutes which were theretofore made against bankrupts, and for the relief of creditors, shall be in all things beneficially construed

strued for the relief of the creditors of the bankrupts; so that the law itself directs a beneficial construction to be made for the creditors; and when a law does by express provision enact how constructions shall be made, the clause so directive of construction is of the same force and authority as any other part of that law.

Mr. *Solicitor General* and Mr. *Browne* argued on the other hand, that these laws were rather penal than remedial, the party being therein called an offender, &c. which he does not appear to be until he is declared a bankrupt, and that declaration is the *dealing* meant by the statute; for, till then there can be no proceeding upon the commission properly so called. *Shelley's* case is quite different; for, recoveries being common assurances, the law favours them, and does not enter into any inquiries about the particular minute of the day the party died upon. Had this law not been made, the commissioners could not have proceeded after the bankrupt's death; and the words of the statute seem to mean that he should be declared a bankrupt first.

(186)

Lord Chancellor. The plaintiff, if contented to come in under the commission, will be intitled to the benefit of it: but his intent seems to be, to set aside all the words of this *Statute* of 17. 1. it looks as if some doubt had been conceived, whether the party's death determined the commission? The former statutes being, that they should seize his body, which they could not do when the party was dead; but it was always clear, that no commission could be taken out against a man after his death: then (whatever might occasion the doubt) comes this statute, which says, that when the commission had been *dealt* in, &c. what is a *dealing* in it is the question?

Indeed I know no particular act, as distinct from another, which can be called a *dealing*. It has been

said, that the declaring him a bankrupt was the act meant; but that declaration of the commissioners being only discretionary and for caution, and not at all binding to any body, it is not probable that the act should intend that only to be a *dealing*, which it hath not any where given the commissioners power to do; whatever is done in pursuance of the commission is a *dealing* in it if never so minute; and the rather, for that these being remedial laws, are to be beneficially construed in favour of the creditors. I cannot therefore put a narrow constrained construction upon the words *dealt in*, in order to overthrow this commission, and all the just right of the creditors claiming under it.

The plea was allowed. (r)

(187)

Case 40.

7 April.

Lowther versus Carleton. (s)

A man by marriage articles agrees to settle a church lease upon himself and wife, and the issue of the marriage; he afterwards sells it to a stranger, who had no notice of the marriage articles; the executors of

A Church lease of twenty-one years, obtained by the plaintiff's grandmother, was, upon the marriage of his father and mother, surrendered to the dean and chapter of *Carlisle*, and a new one for the same term granted to the plaintiff's father and mother, which by articles was agreed to be settled on them for their lives and the life of the survivor, and then upon the issue of the marriage; the father and mother afterwards surrendered this new lease, and a new one was granted to a stranger, to whom the father had mortgaged the second; the last lease was afterwards purchased by the late Marquis of *Wharton*, who did not appear to have any notice of this vendee sell to *B.* who had full notice of the marriage articles, and took a collateral security of the executors for the better assuring his title. *B.*'s purchase shall stand good against the plaintiff, who claims under the articles.

(r) *Reg. Lib. A.* 1735, fol. 188.

(s) 2 *Eq. Caf. Abr.* 685. S. C. 2 *Atk.* 242. S. C.

the

the marriage articles. The defendant purchased the Marquis of *Wharton's* title of his executors; who upon the purchase gave him a collateral security for the better assuring his title: but previous to this purchase the defendant had notice of the marriage articles, which were shewn to him by his own father; and now the plaintiff brought his bill to be let into possession of this leasehold estate, and praying that the defendant might be considered as a trustee for him.

The defendant pleaded his purchase, and confessed the notice; but principally insisted upon the Marquis of *Wharton's* purchase without notice, whose title was now in him.

Lord Chancellor. Had this bill been brought against Lord *Wharton* himself, and he had pleaded that he was a purchaser without notice of the articles, the plea would have been good; he having the law on his side, and having both law and equity, the Court would not take it from him: and as the Court would not have given any relief against him, so neither would it against his executor; for, if the plaintiff's title had not been good against the Lord *Wharton* himself, it would not be so against his executors; and therefore his death is not material. Had the defendant paid nothing at all for his purchase, yet the plaintiff could not prevail against him; because, though he were but a voluntier, yet he claims under a purchaser without notice, who hath barred the plaintiff's right, and all the purchaser's right is now devolved upon him. (183)

Indeed it hath been objected, that the defendant is a purchaser with notice under the Lord *Wharton*: but because he is so, shall he be in worse condition than a voluntier or executors claiming under Lord *Wharton* would have been? A voluntier claiming under a purchaser for a good and valuable consideration without notice, would have a clear and abso-

lute right; and shall not the defendant have it also, because he is a purchaser with notice of the plaintiff's title? As the Lord *Wharton* had a right of enjoying it, so he had of aliening it: and when he had so done, his alienee hath the same right that he himself had. Nor can the defendant's taking a collateral security make his case the worse; for, though he might be relieved against the Lord *Wharton*'s executors upon that security, yet what relief can they have where the testator was a fair and honest purchaser.

(189) The executors, upon some doubt arising in the purchaser as to the title, gave him a collateral security; but why should they be liable to make satisfaction out of this security, when if they had kept the term in their own hands, it would never have been taken from them by the plaintiff? The security being given only to satisfy the purchasers' doubts, shall never turn to their disadvantage. If the Lord *Wharton* can be affected with notice, then all will be overturned: but if he cannot, the defendant's plea will be good. I remember a case where a purchaser, with notice, aliened to one who had no notice; and there, although the Court would not affect the purchaser without notice, yet it being a fraud, the vendor, (who was the purchaser with notice) was decreed (t) to make satisfaction to the plaintiff.

And so allowed the plea.

(t) *Vide Harrison v. Farth, Prec. in Chanc. 51. Brandlyn v. Ord, 1 Atk. 571.*

Rolt versus Rolt.

Case 41.
10 April.

MR. Baynton being seised in fee of a considerable estate, and having no children, by indenture January 19, 1715. covenanted to suffer a recovery of all his lands, to the use of himself for life, then to his wife for life, then to the issue of their bodies; and for want of such issue, in trust for his sister *Anne Rolt* for her sole and separate use during life; and after her death, if *Edward Rolt* her husband should survive her, to permit him to receive the clear yearly sum of 1000*l.* during life, and afterwards to *Edward Rolt* (eldest son (*u*) of *Edward* and *Anne*) for life, with remainder to his first and other sons, with like remainder to *Thomas*, and all the other sons of *Edward* and *Anne*. Then comes this proviso: "Provided also that it shall and
 " may be lawful to and for the said *Anne Rolt*, with
 " the consent of the said *Edward Rolt* her husband,
 " and for the said *Edward Rolt* her surviving, from
 " time to time, by sale, mortgage or otherwise,
 " charging the premisses, to raise and secure such
 " sums of money not exceeding in the whole the
 " sum of 12000*l.* as the said *Anne*, notwithstanding
 " her coverture, shall, with the consent in writing
 " of her husband, think fit, and for the said *Edward Rolt* her surviving, as he shall think fit, for
 " the maintenance and portion of any of the children,
 " at their ages of twenty-one, with interest at 5*l. per cent.* for their maintenance to commence from the time of the appointment; and if no appointment, then from the death of the survivor of *B.* and *C.* And if any of the younger children die before their shares become payable, the same to go to the survivors. *A.* dies, *C.* dies, leaving four younger sons and two daughters; one of which died an infant soon after her father; then *B.* dies without making any appointment, the whole 14000*l.* shall be raised, and carry interest only from the death of *B.*

A. settles his estate to his sister *B.* for life, remainder to her second and other sons in tail, &c. and gives her a power with the consent of *C.* her husband, and for *C.* surviving *B.* to charge it with a sum not exceeding 12000*l.* for their children; and if they or the survivor of them do not appoint the provision, then 2000*l.* each to be raised for younger sons, and 3000*l.* each for daughters,

(*u*) In the Reg. Book he is stated to be the second son.

(190) “dren of them the said *Edward* and *Anne*, born or
 “to be born; and if the said *Edward* and *Anne* his
 “wife, or the survivor of them, shall not appoint
 “in what proportion such their children shall be
 “provided for, then all the parties to these presents
 “are agreed that 2000*l.* a-piece shall be raised and
 “payable to each such younger sons, and 3000*l.*
 “a-piece for the daughters of the said *Edward* and
 “*Anne*; and if there shall be but one daughter,
 “then 6000*l.* for such only daughter, at their ages
 “of twenty-one years, with interest for the said se-
 “veral sums after the rate of 5*l.* per cent. for their
 “several and respective maintenances until their re-
 “spective portions shall become payable; and such
 “maintenance to begin from the time that shall be
 “appointed by the said *Edward* and *Anne* his wife,
 “or the survivor of them; and in case no such ap-
 “pointment, then from the death of the survivor
 “of them the said *Edward* and *Anne* his wife: then
 “comes a provision, that if any of the younger
 “children die before their respective shares become
 “payable, then the share of such child so dying
 “shall be equally divided amongst the surviving
 “children.”

Mr. *Baynton* died soon after without issue, and then, in the year 1722. Mr. *Rolt* died, leaving issue by his wife four younger sons and two daughters, *Elizabeth* and *Anna Maria*, which last died an infant soon after her father's death; and in the year 1734. the mother died, having never charged the lands with the 12000*l.* or any other sum for the younger childrens' provision, nor given any direction in what manner or proportion they should be provided for, some of the children having attained their age of twenty-one in her life-time.

The questions were, first, whether, there having been no appointment made by the father or mother, the sum of 12000*l.* only should be raised pursuant to the power given to them? or, whether the whole sum

sum of 14000*l.* should be raised pursuant to the clause, which in default of appointment, gives 2000*l.* to each younger son, and 3000*l.* to each and every daughter, there being four younger sons and two daughters, one of whom died an infant in her mother's life-time? The second question was, whether such of the children as attained their ages of twenty-one in their mother's life-time, should have interest for their portions from that time, or only from the time of their mother's death?

(191)

Lord Chancellor. The first question is, how much shall be raised for the younger children, whether the whole sum of 14000*l.* or only 12000*l.*

By the first clause it is clear, that no more than 12000*l.* was to be raised; but the doubt arises upon the second clause, whereby particular sums are provided for each younger child in case no appointment be made by the father or mother, which hath not been done; and by the number of younger children the particular sums provided by this clause amount to 14000*l.* This second clause indeed is not an independent clause, but subsidiary to the first: in case the first does not take effect, then this second is to prevail, whereby he hath made a certain direct charge of 3000*l.* for each daughter, and 2000*l.* for each younger son, without any provision (as there is in the first clause) that the whole shall not amount to more than 12000*l.*

In the first clause, where he delegates the power of charging, he thought it proper to confine that discretionary power given; but where he was to charge the estate himself, as by this second clause he does, there was no reason for him to confine his own discretion: and if so, can a court of equity (where there are six younger children, and the estate well able to bear the charge) seek for a foreign intention to take away their bread? The question, whether

whether *Anna Maria*, who died in her mother's life-time, be such a daughter as can be said to have any interest in this sum of 3000*l.* depends upon the construction of the deed, whether it was a certain charge before, or not until the mother's death?

(192)

The power of appointment is not given to the husband and wife jointly, but to her, to be executed with her husband's consent; which shews that he intended that she might execute it during her coverture; and in case the husband should survive her, then there is an express provision that he might execute it; but in case she survived her husband, as she did, it is not so clear by this clause, whether by the first gift of the power to her, he intended to enable her to execute it during the coverture only, but under the control of her husband? or, whether she might execute it after her husband's death? This I say is not clear by this clause; but the other clause of maintenance makes it so, and proves his intent to be, that it might be done either way; for, it says appointed by the survivor; and therefore the taking it in the first sense would be taking away the effect of the words: whereas in all cases the construction must prevail which makes the whole consistent; and where there are plain and ambiguous words, those that are ambiguous and doubtful must give way to such as are plain and obvious. By the first clause such children only can be considered as entitled to any share under the power of appointment, as were living at the survivor's death; but no appointment having been made, it stands upon the second clause, which is a direct charge upon the land of 2000*l.* and 3000*l.* for each daughter.

The next question is about the interest, from what time it shall be payable? And I am of opinion, that although the payments were to be at twenty-one, yet no certain interest vested in any of the children until the survivor's death: and although

though some of them attained their ages of twenty-one in their mother's life-time; yet all being contingent until the survivor's death, no interest can be due but from the time of the happening of the contingency.

And so decreed the whole 14000*l.* to be raised, and interest from the mother's death only. (x)

(x) *Reg. Lib. A. 1735, fol. 212.*

DE

Termino Paschæ

9 Geo. II.

IN CURIA CANCELLARIÆ.

Case 42.

24 May
1736.

Bradley versus Powell.

A. the father, and *B.* the eldest son resettled an estate, to the use of *A.* for life as to part, then to trustees for two hundred years, to raise 1100*l.* to be paid to the second son within six years after *A.*'s death, or as soon after as the same could be raised, and in the mean time interest from *A.*'s death, for and towards his maintenance, remainder to *B.* the eldest, &c. *C.* died indebted, and two years after him *A.* died; from whom a good estate came to *B.* The creditors cannot have this portion raised, the contingency upon which it was payable never happening.

JOHN Powell being tenant for life, with remainder to *Henry* his eldest son in tail, they two agreed to resettle the estate, and a recovery was accordingly suffered to the use of *John* the father for life as to part, then to trustees for two hundred years, upon trust to raise 1100*l.* to be paid to *Richard Powell* (the second son of *John Powell*) within six years after the death of *John*, or as soon after as the same could be raised, and in the mean time interest from the death of *John* the father, after the rate of 5*l.* per cent. for and towards his maintenance until the portion be paid to him, remainder to *Henry* the eldest son for life, and to his first and other sons in tail, &c. *Richard* the second son died considerably indebted, leaving no assets, after having attained the age of forty-five years; and two years after *John* the father died, by whose death an

estate

estate of 700*l.* *per ann.* came to *Henry*, and from him to his son the now defendant.

The bill was brought by the creditors of *Richard* against the defendant and the trustees, to have the 1100*l.* raised and applied towards the payment of his debts: the defendant *Powell* insisted, that *Richard* dying in his father's life-time, the portion could not be raised, not being transmissible to his representative, but shall merge in the land for the benefit of the defendant, who was heir at law.

Lord Chancellor. It has been doubted whether this settlement was not to be considered as voluntary? But I think it was made upon a good and valuable consideration, and that the parties are purchasers under the recovery suffered by the father and son, and therefore *Richard* is to be considered as a purchaser for the 1100*l.* in question. But the main point is, whether this 1100*l.* is to be looked upon as a portion? And I think it must be considered in that light, it moving from the father, and being intended by him as a provision for his child. The rule of portions sinking in the land where the party dies before the term out of which they are to arise, comes into possession, hath not always held without exception; as appears from *Butler* (y) and *Duncomb's* case, 2 *Vern.* 760. where the words were *from and after the commencement of the term*, and therefore the portion not payable during the life of the father and mother, the term not being yet commenced; but yet the Court enabled the husband and wife to raise money upon the interest by way of mortgage; which was, to consider it in some sort as already vested. So in that of *Broome* (z) versus *Berkley*, *Abr. Eq. Ca.* 340. notwithstanding the portions were decreed not to be

(y) *Ante* 122-3. (cited) and 1 *P. Will.* 448. S. C.

(z) *Ante* 123 (cited).

(195)

raised immediately; yet they were considered as transmissible interests. The same in *King (a)* and *Wither's* case, in the *House of Peers*. In all these cases the limitation was, that the portions should be paid them at such a time, as upon marriage, or at such an age; and the intent of the parties was plain, that upon either of these contingencies happening, the child should be entitled to the portion, although it was contingent; since a contingent interest is transmissible, and a future provision may well be looked upon as a consideration for marriage. In the present case, the term and the trust are not to arise until the father's death; but no particular time is limited for the payment of the 1100*l.* but barely within six years after his father's death, and not made payable to him, his executors and administrators, &c. but barely to him, with a provision, *that from the father's death 5*l.* per cent. shall be raised for and towards his maintenance*; which looks as if the intent was to postpone the vesting until the death of the father; since *the 5*l.* per cent. for and towards his maintenance* can never be raised by them to that purpose, when he died in his father's life-time. This first act which the trustees are to do, *viz.* That of providing for his maintenance, necessarily supposes him living at his father's death; and where the interest is contingent, as it is in the present case, it is most conformable to reason to consider the principal as contingent likewise.

But if the construction should be otherwise, the term, by the express words of the trust, can never cease; it being to endure *for and towards his maintenance until the portion be paid unto him*; which it can never be, since he died in his father's life-time.

(a) *Ante* 117. 122.

I therefore think the whole was contingent, principal as well as interest; and that it differs from the case of *Broome* versus *Berkley*, and of *King* versus *Withers*; (b) for that in those cases marriage ensued, which was one of the times appointed for payment: but here the 1100*l.* is limited to be paid to him within six years after his father's death, without any other limitation; and he dying in his father's lifetime, the contingency hath never happened; and the portion must therefore sink for the benefit of the owner of the real estate.

And so dismissed the bill. (c)

(b) *Ante* 117.

(c) Lord *Talbot*, in his argument of this case, admits some exceptions to prevail against the general rule, viz. "that charges upon land, payable at a future day, shall not be raised where the party dies before the time of payment:" but he endeavours at a distinction between the present and the cases in which those exceptions are found to prevail; for in the latter he considered the intent of the parties to be manifest, viz. that the portion, although contingent, shall be raised, whenever the contingency happened, (as marriage, arriving at such an age, &c.) which was to precede the raising of the portion, and was the cause of it. In the present case, he observed, the trust is not to arise until the father's death, and no particular time limited for payment of the 1,100*l.* but barely within six years after the death of the father, without any farther limitation; and *Richard* dying in his father's life-time, consequently the contingency, which was to entitle him to the payment of the 1,100*l.* never happened, and therefore he thought the portion must sink for the benefit of the heir. Lord *Hardwicke*, however, in giving judgment upon the case of *Tunstall v. Brachen*, inserted in 1 *Bro. Cha. Rep.* 124. observes, he had a great opinion of Lord *Talbot's* judgement, but yet, if he had then heard that case, (*Bradley v. Powell*) he should not have been of that opinion, for he thought it a very hard case. *Vide King v. Withers, ante* 117. and references.

Case 43.
27 May.

Hunter versus Maccray.

Though England and Scotland be now one kingdom, yet the writ of *ne exeat regno* has not been altered since the union. It was originally a state writ.

2. Whether, in the common form, and security given thereupon, it can restrain the party from going into Scotland?

A MOTION was made before the Lord Chancellor, that a *ne exeat regno* might be so framed as to prevent the defendant from going into Scotland, upon affidavit made that he was soon going to reside there, and that he had confessed, that as trustee for the plaintiffs under their father's will, he had received the sum of 10,000 *l.* The common order had been made at the *Rolls* for a *ne exeat* to issue (upon a petition there preferred) and marked for 10,000 *l.* bail; and this motion was now made upon an apprehension, that as the writ was only to restrain him from going out of the realm, it could not restrain him going into Scotland, which by the union is now the same kingdom, and yet as effectually out of the reach of the process of the court as any other foreign part which is of the king's allegiance.

His Lordship asked how they would have it altered? and what authority he had to alter an original writ? especially as this writ was not originally intended to aid the process of the court, but was a mandatory writ, to prevent the king's subjects from going (*d*) into foreign countries to practise treason with the king's enemies? And he seemed to think, that this case must have happened since the union; and yet he had never known, nor heard, that any attempt had been made to alter the writ: and he said, that perhaps there was no foundation for the doubt, whether the common writ would not prevent the defendant from going into Scotland, as well as any of the king's other dominions out of the reach of the process of the court.

(*d*) For the use to which this writ was originally applied, vide *Bacon's Tracts*, 295. *ex parte Bruncker*, 3 *P. Will.* 313.
Mr.

Mr. *Hamilton* informed the court that something of this kind had been moved, in one *Mitchel's* case, in the Lord *Cowper's* time; who seemed to think that the writ extended to *Scotland*, notwithstanding the union, and did nothing in it. The registers likewise said they never knew any other than the common order made. His Lordship considered whether he might not direct that the sheriff should take security, that the defendant should not go out of that part of *Great Britain* called *England*; but as such an order might be liable to objections, as, whether the defendant might go into *Wales*? Whether it would be necessary to give the same direction in every other case as well as in the present? And whether it would not be countenancing an objection, which otherwise, perhaps, would not be of any force? He said, that it was dangerous to alter old established forms, (e) and therefore would make no order in it; but left the parties to proceed in the old beaten path. (f)

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(e) *Sed vide Done's case*, 1 *P. Will.* 263. where it was granted to prevent the party from going to *Scotland*, and also for a defendant against a co-defendant. Lord *Harcourt*, considering the party by flying into *Scotland* to be out of the jurisdiction of the court, and consequently out of the reach of the process of it.

(f) *Reg. Lib.* 1735. fol. 407.

DE
Term. S. Trinitatis

10 Geo. II.

IN CURIA CANCELLARIÆ.

Case 44.
5 July.

Scarth versus Cotton.

An estate conveyed in trust to be sold to pay incumbrances, the residue in trust for the grantor and his heirs; upon a bill brought by another creditor against the trustees and heir, who was a minor, and the heir

answering that the parol ought to demur during the minority, because (as to the residue) it was only assets: it was ordered accordingly, although the infant's counsel would have waived it as prejudicial to the infant.

A BILL was brought by the plaintiff, as a bond-creditor, against the defendant as trustee of the estate of one *John White* (who had in his lifetime conveyed it to the defendant, in trust to sell all or so much of the same as would be sufficient to pay his debts, and the incumbrances charged upon it, and then in trust for his own right heirs) in order to have the estate sold, the prior incumbrances paid off, and then to be paid his debt out of the residue. The daughter and heir, who was an infant, was also a defendant; and she, by her answer, insisted, that being an infant, the parol ought to demur; because that although it was a trust for paying off incumbrances which then affected the same, yet as to the residue, it was only assets.

The *Lord Chancellor* thought it was so, and that there was no difference between legal and equitable assets: and although in this case it would be to the infant's prejudice to take advantage of the law, because the interest would out-run the rents and profits

(199)

fits of the estate; yet, it being mentioned in the pleadings, he said he could not avoid ordering it, although the counsel would have waived the objection. And so an order was made to take an account of what was due to the plaintiff; but all proceedings to stay until the defendant came to age, and the plaintiff to pay all parties their costs, (g) except the infant, and to have them again out of the estate. (h)

Galley versus Baker.

Case 45.
3 July.

THE Duchefs of D— being seised in fee of a house and gardens in *St. Giles's* in the Fields called *Whitehouse*, upon the 7th of *April* 1662, made a lease of the premises to the then archbishop of *Canterbury* and other trustees, for the benefit of the rector of the parish and his successors, for the term of ninety-nine years; and afterwards by her will, dated *November* 2, 1668, reciting the lease directed her heirs to convey, from time to time, as the rector of *St. Giles's* and his successors should direct, declaring her intent to be, that the said house should remain as a dwelling-house for the said rector and his successors for ever, as a free gift by her. There was at her death a lease for lives subsisting, which determined in 1681, when the late archbishop *Sharp* was rector; who finding that the house was so old and ruinous that it could not conveniently be made an habitation for the rector; and thinking it would be more for the advantage of him and his successors to let out the ground on a lease for years, than to let it stand idle, he made a building-lease is made of church-lands, by a deceit put upon this court by the lessor; who takes a large fine from the lessee, though nothing of that was mentioned in the proposal laid before a master: the executor of the lessor was decreed to refund this money to be laid out in a purchase for the benefit of the successors; but the lease was allowed to stand good, because it did not appear that the tenant was privy to the imposition upon the court,

(g) *Vide Viner, Abr. tit. Infant, letter (Q). Creed v. Colville, 1 Vern. 173. Davison v. Goddard, Gib. 66. Chaplin v. Chaplin, 3 P. Will. 368. Uvedale v. Uvedale, 3 Atk. 117.*

(h) *Reg. Lib. A. 1735. fol. 518.*

(200)

building-lease, at a reserved rent, came to an agreement with one *Boswell* to let him a lease for forty-one years, at 11 *l. per ann.* to build houses on; and a bill being brought by *Boswell* to have this agreement carried into execution, it was decreed by the Earl of *Nottingham*, that a lease should be made, with covenants to build; and a lease was accordingly made the 27th of *February* 1682, by Dr. *Sharp*, and the heir of the duchess, and the surviving trustee of the term.

Boswell laid out a considerable sum, and built sixteen good houses; and his lease expiring at *Michaelmas* 1720, when the late Bishop *Barker* was commendatory rector of *St. Giles's*, the bishop, in the year 1724, brought his bill, setting forth all the former proceedings, and suggesting that the houses were so ruinous that it was necessary to rebuild them, which nobody would undertake unless a building lease could be obtained for a long term, and prayed it might be inquired under what rents and covenants it was proper to have such a lease granted; the Court thereupon sent it to a master, who reported that the parties proposed to let a lease for sixty-one years, and to improve the rent from 16*l.* to 20*l.* and made it appear that the houses were ruinous, and that it would be for the benefit of the rector to have such a lease made with proper covenants; which the Court accordingly ordered, and a lease was made *June* 22, 1725, but in it there was no covenant to rebuild, only in case where any was necessary to be pulled down: and it appeared by the evidence that the bishop had taken 600*l.* for a fine of the lessee; but nothing of it appeared upon the lease: in fact, the houses wanted a great deal of repair, but not to be rebuilt; nor was any one of them rebuilt, but about 700*l.* laid out in repairs, the rents being now 167 *l. per ann.*

This bill therefore was brought by the plaintiff the present rector and immediate successor to the bishop,

bishop, against the bishop's executor and against the lessee, either to avoid the lease, as obtained by fraud upon the court, and on a contract injurious to the successor, or to have the 600 *l.* with interest from the bishop's death, for the benefit of the successor, the present rector.

Lord Chancellor. There was not the least suggestion to the Court that the bishop intended to take a fine, or make any private advantage; but only a desire of having it inquired how the end of the trust might be best answered. (201)

In his proposal to the master he says, that notwithstanding the inconvenience he hath been at for want of a rectory house, yet, provided he may have leave to make a lease, he is willing to do it; which is said to be a suggestion that he intended to take a fine. It might be a dark intention, and shews skill in imposing upon the Court, but cannot make the case the better. Affidavits were laid before the master, *that the houses would fall of themselves if not speedily taken down*, which was the inducement to the Court to make a final decree, and thereby give leave to lease; and the present bill is not to set aside the former decree, nor can it be done by original bill, except in case of apparent fraud; nor is the decree wrong in itself; but it hath not been rightly pursued, and a wrong use hath been made of it in the carrying it into execution.

According to the decree there should have been no fine, and there should have been proper covenants. If there had been no fine, the bishop would never have agreed to this lease at the rent of 20 *l.* *per ann.* and if the facts had been known to the Court, it would never have ratified the lease: this therefore is what the present bill is brought to rectify. The questions are, first as to the lessee who does not appear until 1725, (being no party to the former cause) when he was told that the bishop had

(202)

power to make such a lease, he looked no farther back than the decree; he saw the power that the bishop had, and it does not appear that he had a great bargain: so that it seems too hard to set aside his lease, and the rather because part is sold, and the repairs have been great. But secondly as to the bishop, I have no doubt but the 600*l.* ought to be considered as a part of the trust from which it flowed, and ought to be repaid with interest at 4*l. per cent.* to the present rector, from the death of the bishop.

And so decreed the 600*l.* to be laid out in a purchase for the rector (*i*) and his successors, and until such purchase made, to be laid out on security in trustees' names, and the bishop's executors to pay costs out of his assets; but as against the lessee dismissed the bill without costs.

Case 46
10 July

Stapleton versus Colvile.

A. devises
his lands to
B. his wife
for life,
chargeable
with two
annuities
for life,
and with a
legacy of

1000*l.* and gives *B.* power to raise by sale or mortgage of any part, such a sum as would be sufficient to pay his debts due at his decease; and then reciting the great satisfaction he had of his estate's having continued long in his name and family, and his desire to perpetuate both, as far as might be, he devises all his real estate, after his wife's death, to his nephew *C.* for life, remainder to the sons of *C.* successively in tail, &c. upon condition of their taking his name and arms; and then gives all his personal estate to his wife, and makes her sole executrix: she shall take the personal estate free from the debts of the testator; it shall not be applied in exoneration of the real.

(i) *Reg. Lib. A. 1735. fol. 342.* by the name of *Galby v. Sharplese.*

he

he had of his estate's having continued so long in his name and family, and the great desire he had to perpetuate, as far as he could, his name and estate, he devises all his real estate (after his wife's death) to his nephew *Robert Lupkin* for life, remainder to his first and other sons in tail, &c. upon condition of their taking and using the name and arms of *Colvile* for ever: and then, in the close of his will, he gives all his goods, chattels and personal estate to his wife, and makes her sole executrix.

The question was, whether the wife should take the personal estate exempt and discharged from the payment of debts? or whether the personal estate should not according to the general rule be first applied. It had been decreed at the *Rolls*, that the charge should be intirely upon the real estate, and the wife to have the personal estate to her own use,

(203)

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney* and Mr. *Hamilton* argued, that by the known and general rule, the personal estate was the proper fund for payment of debts; and that it hath been always held, that where there are no words in a will to exempt it, either particularly or by necessary implication, it shall be applied first; and whenever it hath been held otherwise, that hath only been to satisfy the testator's intent, who being master of the whole may give and dispose of it in what manner he pleases; as in the case of a devise to trustees to sell for payment of debts, &c. But where the debts are only charged upon the estate, the personal estate must be first applied, according to the distinction in *Wainwright* (k) and *Bendlow's* case, 2 *Vern.* 718.

That in this case the clause whereby he hath disposed of his real estate, was to be considered but

(k) *Prec. in Chanc.* 451, S. C.

(204)

as auxiliary to that whereby he hath disposed of his personal estate; and whether the devisee of his personal estate takes as executor, or in any other manner, both law and equity make him but as a trustee for the creditors, who have the best right to it: and although the testator makes both real and personal estate the fund for payment of his debts, yet there shall be no average; but the real estate shall be chargeable only in case of deficiency of the personal. So where the personal estate is devised to one who is made executor, unless there be particular words to exempt the personal estate, it shall pass to the devisee but as executor, and consequently applicable in the first place; according to *Cuttler and Coxeter's case*, 2 *Vern.* 302. and *French and Chichester's case*, 2 *Vern.* 568. the last of which is a very great authority, being warranted by the opinion of the Lord Keeper *Wright* and the Lord *Cowper*, who both decreed the personal estate to be first applied, notwithstanding that the trust-estate was expressly and directly charged with payment of debts. So in *Harewood and Child's case*, heard by the present Lord Chancellor, August 13, 1734. where the words were, "I devise all my manors to *A.* and *B.* and their heirs, in trust that they and their heirs, out of the rents and profits, or by lease, or mortgage, or sale thereof, or any part thereof, shall raise so much money as I shall owe at my death; and after payment of my debts, and reimbursing themselves, upon farther trust that they and their heirs shall stand seised of such part of the premises as shall remain unsold to and for such persons and uses as the manor of *C.* is already settled; and if any money remains after payment of my debts, it shall be paid to my daughter, and such as are intitled to the said manor by the limitation aforesaid." He had already given the manor of *C.* to his daughter in tail, with remainder to his nephew; and then he gave all his personal estate, of what nature or quality soever, to his daughter, whom he made executrix; and it was held,

held, that notwithstanding this exprefs devise to the trustees, the personal estate should be first applied in discharge of the real. The like was decreed in *Brombale* and *Willbrabam's* case at the (1) *Rolls* about four or five years ago, where the testator devised in the following words, viz. "All my personal estate, of what nature, kind or quality soever, I give to my sister *A.* whom I make my executrix, and all my real estate, of what kind, nature or quality soever, I give unto my two sons *B.* and *C.* chargeable with my debts." It was held at the *Rolls*, and afterwards by Lord Chancellor *King*, that the personal estate should be first liable. And the same had been before decreed in the case of *Lord Gray* versus *Lady Gray*, 1 *Chan. Ca.* 297. and that of *Mead* versus *Hide*, 2 *Vern.* 120. In the present case there is no devise to trustees for payment of debts; but a beneficial interest is given to the wife for life, with a power to raise, by sale or mortgage of the inheritance, such a sum as will be sufficient for the payment of his debts; which was intended only to enable her to dispose of the inheritance in case of necessity, but not at all to take it out of the common rule; being no more in effect than charging the real estate; which could be charged only by one of the two means chalked out by the testator. Indeed without this particular power, the wife being but tenant for life, could neither sell nor mortgage the inheritance; but that can be no objection, since in case of a deficiency of the personal estate the inheritance would still be liable, although she had no power of charging it. Besides, the devise to his nephew after his wife's death, evinces the testator's intent to be, that the real estate should not be chargeable but upon deficiency of the personal, it being upon condition that his nephew shall take his arms; which always im-

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(1) The decree in which case was afterwards affirmed by Lord Chancellor *King*, *vid. post.* 274.

plies the testator's intent to give the devisee as large, beneficial and great estate as possible to perpetuate his name and family; and was one of the reasons for decreeing a fee simple to the devisee in *Ibbetson (m)* and *Beckwith's* case.

Mr. Browne, Mr. Fazakerley and Mr. Idole insisted on the other hand, that upon the whole frame of this will the testator's intent clearly appeared to give his personal estate to his wife, exempt from the payment of his debts; and that all the cases cited on the other side did but evince the general rule, without governing the present case, which was quite different from every one of them all. The directions given in respect of his debts, are contained in the clause whereby he disposes of his real estate, and with that clause he hath closed every thing in regard to his debts; the devise of the personal estate standing sole and single, without any thing therein relating to the payment of his debts. And when an express devise is to be controlled by implication, it must be such an implication as is absolute and necessary; whereas in this case the testator's intent plainly appears, to give his personal estate to his wife absolutely, without any charge; having used no words which, either by themselves, or by any implication, can denote an intent in him that the personal estate given should be charged with his debts; and since he hath not, neither this nor any other Court can narrow his expressions so as to make the disposition different from what he intended it to be. Had he intended the charge to lie upon the personal estate, he needed only to have charged the real estate in aid of it; but would never have been so exact in describing the particular manner in which the real estate should be made chargeable with his debts, as he hath been in his creating this power; which if it is not con-

(m) *Ante* 157.

sidered as a beneficial power given to the wife in order to ease her own estate, can never have any effect: and it is not at all to be compared with an authority given to trustees to sell; there being a very great difference between such bare general powers to a third person to sell, or do some other act, and such a particular beneficial power as the present one; which, when given to a person to do a thing that is and will be advantageous to him, is to be considered in the same light as if the giver himself had done that thing; particularly in the case of a wife, as it is here. The devise of the personal estate is *all his goods, chattels, &c.* by which words, unless a part can be taken for *all*, she must take the whole personal estate discharged from any out-goings; for, the word *all* implies it: since though as to the creditors the personal estate cannot be looked upon as *his* after his death, yet between legatees and devisees, it is as much his, and to be looked upon as such after his death as during his life. And in all the cases where the intent has clearly appeared to discharge the personal estate, it hath made no difference whether the devise was to charge the real estate only, or to sell it. According to *Bamfeld* and *Wyndham's* case, *Precedents in Chan.* 101. where the devisee of the personal estate was almost in the same words as here, and which though decreed upon the reason, that if the personal estate should not be exempted, nothing would be left for the wife, yet seems likewise to have gone upon the words of the devise themselves. So in the case of the *Attorney General* and *Barkham*, decreed in this Court about two years since, where the testator devised in the following words, *viz.* “ For
“ the just and true performance of this my last will,
“ and for the payment of all my debts, I give and (207)
“ devise all my real estate; and as to the personal
“ estate, which at the time of my death I shall be
“ possessed of and intituled unto, I give the same
“ unto my executor and executrix herein named,
“ to defray my funeral charges and expences; and
“ if

“ if my personal estate shall fall short to discharge
 “ the same, then the remainder to be paid to my
 “ executors out of the first rents and profits of my
 “ real estate, as they shall become due after my de-
 “ cease until payment be made of all my legacies,
 “ debts and funeral expences as aforesaid; and if
 “ there be any surplus of my personal estate, that
 “ then my executors pay the same to my dear and
 “ loving wife:” and held in this case, that the per-
 sonal estate should go to the wife discharged from
 the payment of debts. The cases of *Harewood*
 (n) versus *Child*, and of *Broomball* (o) versus *Wil-*
brabam are very different from the present case;
 for, in the first the daughter was to take the whole
 either way, whether as real or personal estate; and
 therefore the doubt there could only be with regard
 to the representatives. And in that of *Broomball*
 versus *Wilbrabam*, had the real estate which was
 devised to the sons been charged with the debts,
 the sons would have had nothing at all; and the
 testator’s sisters, who were the devisees of the per-
 sonal estate, would have run away with the whole;
 so that the question being between the testator’s own
 children and his sisters, it was natural and just to
 construe the intent in favour of his children, and to
 lay the load on the personal estate. But what clear-
 ly evinces the testator’s intent in the present case is,
 that the annuities, legacies and debts are all in one
 and the same clause; and the personal estate being
 as much the proper fund for the payment of lega-
 cies as debts, and the legacies being particularly
 charged upon the land, and coupled and joined with
 the power given for sale of part of the inheritance
 for payment of his debts, shews he intended no dif-
 ference between them. The annuities likewise are
 given in the same clause; and it can never be pre-
 tended that the annuities were designed by him to
 issue out of the personal estate. Then comes a se-

(208)

(n) *Ante* 204 (cited).(o) *Ante* 204 (cited).
paratē

parate distinct clause, whereby he disposes of all his goods, chattels, &c. without any reference to the former, or any thing that looks like an intent of burdening the personal estate with the debts: but those being particularly provided for by a former clause with the legacies and annuities, must be considered as designed by him to issue out of the same fund, and his intent as to all three to be one and the same.

Lord Chancellor. The single question for the judgment of the Court is, whether the personal estate shall or shall not be liable to the payment of the testator's debts? What the *quantum* of the debts, or the amount of the personal estate was at the testator's death, does not appear; if it did, it would give a great light into this matter. Indeed it is not absolutely in the testator's power to take the personal estate from the creditors: but he may substitute another fund in the room of it; and if so, this Court will take care that right be done to all parties, as well the devisees of the personal as of the real estate. The testator's intent must govern the construction of his will, and that intent must be collected from the will itself. In cases where the real estate is charged with payment of debts, and an executor appointed, as in *Wainwright* (p) and *Bendlow's* case, there is no room to doubt of the testator's intent; for, it is no more than charging his real estate for the better security of his creditors in case of a deficiency of the personal; but can never be intended an exemption of the personal estate for the benefit of the executor. A difference hath been taken between the bare charging of the real estate, and a devise to sell: but I think, that in equity a charging of the real estate is almost equal to a devise to sell; since the Court will, upon the necessity of a sale, order it so: and in *Wainwright* and *Bend-*

(p) *Ante* 203. (cited)

(209)

low's case the testator's intent appeared to have the whole converted into money; and therefore that case does not seem to me to weigh much either way. It hath also been said, that where the executor is named in the same clause, the nature of the personal estate is not altered; but it still remains liable to the debts; and some cases have been so decreed: but although that reason may have some weight, yet do not I think it sufficient for the exoneration of the real estate; and unless I was acquainted with the particular circumstances of *French* (q) and *Chichester's* case, wherein the book seems deficient, I can never form any judgment from it; since if the reason given in the book for it be the only one, I cannot say that it gives me intire satisfaction, nor can I lay any great stress upon it; and the rather because there is a plain difference at law between the bare making an executor, and the making him likewise legatee of the personal estate; as it is in the present case; for, in the first instance, if the executor dies intestate before probate, the representative of the testator is intitled to the administration; whereas in the latter, there being an express gift to him, he takes as legatee, and consequently upon his death his representative would be intitled to it; an interest being vested in him, in his own right, in the one case, but nothing at all in the other, until he hath converted it. In the case of *Harewood* (r) versus *Child*, the opinion of the Court was founded upon the completion of the will, which, being taken together, manifested the intent to be, that the daughter should take the personal estate liable to the payment of his debts, she herself being devisee of the whole; and it would have been absurd to imagine the testator to have intended his personal estate to be exempt from the payment of his debts, when he had expressly provided that the surplus of the produce of what should be

(q) *Ante* 203. (cited).(r) *Ante* 204. (cited).

raised

raised out of the real estate should go to the very same person, who was devisee in tail of the real estate. In that of *Broomhall* (s) versus *Wilbraham* the real and personal estates were pretty much of the same value, and the debts must have exhausted the one or the other fund; so that had the judgment of the Court been otherwise, the man's children would have been left without any provision. And in that of *Mead* (t) versus *Hide*, there was an executor, but without any express gift made to him. But in *Bamfield* (u) and *Wyndham's* case the determination was in favour of the wife, that she should take the personal estate exempt from the debts; and there she was made executrix in the same clause: although indeed there be another reason given in the book, of the debts amounting to more than the personal estate. In that of the *Attorney General* (x) versus *Barkham*, the testator had laid the charge upon the real estate, and then taking up his personal estate, mentions particular things which he chargeth it with; so that the surplus there meant, must be the surplus after the particular charges which he had there specified; and therefore this case, being very particular, must stand upon its own bottom and reason, and cannot be compared to the present one. All those cases depended upon the intent plainly appearing, as this must do likewise. After the gift of the annuity and legacies wherewith he hath charged his real estate (wherein I do not think that the using the words *charging* or *chargeable*, will make any difference, since they are used indifferently) he gives his real estate to his wife for her life; and although it does not necessarily follow that the coupling both together, shews he intended both to be payable out of one and the same fund, the personal estate being the proper fund for debts, though no

(210)

(s) *Ante* 204 (cited).(t) *Ante* 204 (cited).(u) *Ante* 206 (cited).(x) *Ante* 206 (cited).

provision.

provision had been made by the testator; but the annuities having none but what is particularly provided for them, yet that must have some weight.

(211) Then comes the power given to the wife, which seems to me very clearly to manifest this intent, that she should take what he hath given to her by his will to her own use. For, his intent being to carry down and perpetuate his estate in his name and family, can it be supposed, that after having given his wife the whole power over his personal estate, by making her executrix, he would likewise give her a power of disposing of so much of the inheritance, (and consequently of defeating the devise to his nephew, not of so much as the personal estate should prove deficient, but of what should be necessary for the payment of his debts,) unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seems clear to give her this power of disposing of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate, free from all charges whatsoever.

And so affirmed the decree in behalf of the wife. (y)

(y) *Reg. Lib. B. 1735, fol. 417.* In the decision of cases upon this subject, the Court seems to have adopted for the ground of its determination the distinguishing circumstances of each, without any direct reference to any general principle as applicable to them all, admitting however the general rule of the Court to be, *viz.* that the personal estate is the primary fund for the payment of debts, and will be so applied in the first instance; unless where the testator by express words, or by plain and manifest implication has exempted the personal, and directed the real estate to bear the burden of his debts: it therefore necessarily follows that in every case of the kind, the principal question must be, whether from the very words used by the testator, or by plain and necessary

necessary inference, the intention of the testator to exonerate the personal estate can be satisfactorily collected. *Wainwright v. Bendlowes*, 2 Vern. 718. *Bampffield v. Popham*, Prec. in Chan. 101. *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271. *Hall v. Brooker*, Gilb. Eq. Rep. 73. *Stapleton v. Colville*, post 202. *Walker v. Jackson*, 2 Atk. 624. *Kynaston v. Kynaston*, 1 Ero. Cha. Rep. 457 (cited). *Anderton v. Coske*, ibid. 556 (cited). *Holliday v. Bowman*, ibid. 145 (cited). *Webb v. Jones*, 2 Bro. Cha. Rep. 60. are cases where the intention of testator appeared sufficiently clear to the Court, to exempt the personal estate. But in *French v. Chichester*, 1 Bro. P. C. 192. *Fereyes v. Robertson*, Bunb. 302. *Ambl. Rep.* 33. *Earl of Inchiquin v. O'Brien*, 1 Will. 82. *Bromhall v. Wilbraham*, post. 274. *Stephenson v. Heathcote*, 1 Bro. Cha. Rep. 458 (cited). *Samevell v. Wake*, 1 Bro. Cha. Rep. 144. *Duke of Ancafter v. Mayer*, 1 Bro. Cha. Rep. 454. the Court held the personal estate to be first liable. In the latter case, the material cases upon this subject are recognized, and the circumstances which governed the decision of each thoroughly considered.

D E

Term. S. Michaelis

10 Geo. II.

IN CURIA CANCELLARIÆ.

Case 47.

Hervey versus Aston.

A. by settlement after marriage creates a term, in trust, by mortgage or sale, to raise 2000*l.* for the portion of each of his daughters, provided they married with the consent of the defendant their mother; then directs a yearly sum to be paid them out of the rents and profits until they marry; and if any of his daughters should happen to die before marriage with such consent, that her portion should cease, and the premises be exonerated thereof; and if such portion should be raised in whole or in part, that the same should be paid to such person to whom the rents until they marry; and if any of them die before marriage with such consent, her portion to cease, and the premises to be exonerated thereof; and if it be raised, to be paid to such person to whom the premises should belong; and by will he creates another trust-term to raise by sale or mortgage 4500*l.* whereof 2000*l.* to be paid to each of his daughters in augmentation of their fortunes, subject to such condition as in the settlement; and by a codicil creates another term for the better raising their portions. *A.* dies, the daughters marry without consent; the portions shall be raised, but the husbands shall make competent settlements.

whom

whom the premisses should belong. By his will 1722. he creates another trust-term, to raise by sale or mortgage the sum of 4500*l.* whereout 2000*l.* to be paid to each of his daughters in augmentation of their fortunes, but subject to such conditions as are declared in the settlement: and by a codicil, in pursuance of a power of revocation, he creates another trust-term for the better raising of his daughters portions. Sir *Thomas* died in 1724. leaving (z) eight daughters, one of whom Mr. *Hervey* married after the age of twenty-one, but without the consent of her mother; and another married Mr. *Clutton* at her age of nineteen, and without consent likewise; and they and their husbands brought their bill (a) against their mother and brother to have their portions and additional fortunes, and to have the real estate applied towards payment of their respective portions; alledging, that upon their respective marriages their portions became payable. Mr. *Clutton*, the husband of one of the daughters, died; whereupon they brought a bill of revivor, and a decree was made by consent, with liberty to apply farther to the Court: and now Mr. *Hervey* and his wife, and Mrs. *Clutton*, preferred their petition for payment of their portions, Mr. *Harvey* offering therein to settle his wife's fortune, and they insisting, that the lands were sufficient to answer the daughter's additional portions.

The *Master of the Rolls* having taken time to consider of this case, now delivered his opinion. The question is, whether the plaintiffs be intitled to those original and additional portions, both the marriages being had without the consent of the

(z) The daughters in *Easter* term 1725, filed their bill against Lady *Aston* and the trustees, for the purpose of having the trusts of their father's will carried into execution, and their portions secured to them, *Reg. Lib.*

(a) In *Trinity* term 1734, *Reg. Lib.*

(214) Lady *Aston* the mother? And first it is to be observed, that these portions are provisions for children. Secondly, that the loss of these provisions is a penalty. And, thirdly, that this court can impose terms upon the husbands as to the settling the fortunes. Nor are provisions for children merely voluntary; since nature obliges parents to take care of their children. *F. N. B.* 284. of the new edition; and that the Court did very early impose terms upon husbands applying for their wives' fortunes, appears from the case of *Skipton*, in a book called *Reports of Cases in the time of Sir Heneage Finch*, 145. (b)

Now, for the clearing up of this question it is to be considered, that by the canon law all conditions against the liberty of marriage are unlawful. *Swinbourne* 150. And in the same chapter it is said, "that although the legacy be given over, yet it is void, as being in restraint of marriage, and consequently against the good of the commonwealth." Thus it stood by the *ecclesiastical* law. (c) And in *Moore* (d) 857. *Pigot's* case, cited by *J. Winch*, comes up to the present case, it was a condition annexed to a legacy that the daughter should marry with the consent of the mother, she married without her mother's consent, and yet sentence was

(b) *Vide* also as to this point *Milner v. Colmer*, 2 *P. Will.* 642. *Jacobson v. Williams*, 1 *P. Will.* 382. *Adams v. Pierce*, 3 *P. Will.* 11. *Brown v. Elton*, 3 *P. Will.* 202. *Bosville v. Brander*, 1 *P. Will.* 459. *Jewson v. Moulson*, 2 *Atk.* 418. *Ex parte Coyssegame*, 1 *Atk.* 192. *Grey v. Kentish*, 1 *Atk.* 280. *Saddington v. Kinsman*, 1 *Bro. Cha. Rep.* 47. *Worral v. Marlar*. *Bushnan v. Pell*, both reported and cited by Mr. Cox in notes, 1 *P. Will.* 460. *Dimmock v. Atkinson*, 3 *Bro. Cha. Rep.* 195.

(c) *Vid.* the case of *Long v. Dennis*, 4 *Burr.* 2055.

(d) *Gresly v. Luther*, S. C. which case, Mr. Justice Comyns is reported to say was determined in the ecclesiastical court, neither did it appear there was any devise over, 1 *Atk.* 376.

given,

given, that she should have her legacy: which shews that the common law courts had adopted the notions of the ecclesiastical lawyers. This Court indeed hath not gone so far; where-ever there is a devise over, that devise over having always been held to be good: but where there is no devise over, such conditions have been only considered as *in terrorem*, 1 *Mod.* 308. *Abr. Eq. Ca.* 110. and there is a reasonable foundation for construing such devises to be *in terrorem* only: for, though a daughter marries without her father's consent, yet it is not to be supposed that this severity (was he living) would carry him so far as to leave her quite destitute. Besides, whatever is injurious to the commonwealth is unreasonable; and therefore it was that restraints of marriages were discouraged by the *Roman* laws: for these reasons this Court hath construed such limitations to be only *in terrorem*, unless there be a devise over. Indeed it hath been insisted, that in the present case there was a devise over; for that, by that clause of the will whereby the testator provides the additional sum of 2000*l.* to each of his daughters, he gives the residue (over and above the 2000*l.* a-piece) to his wife: but the legacy is not by that given over, only the residue over and above the 2000*l.* It hath been likewise insisted, that by the clause in the settlement declaring, that if any should die before marriage with such consent, that her portion should cease, there was a sufficient disposition of it: but surely this is not a good disposition within the meaning of those cases that allow a limitation over to be good; for, this is not to take place upon marrying without consent, but upon dying before marriage with such consent, and is no more than providing for daughters dying unmarried; he taking it all along that if they married they would do it with consent. Here does not appear to be any person in the testator's view to whom these fortunes should go over; as there does in all the cases where these limitations over are allowed: the intent being as clear in those cases to give it over

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upon breach of the condition, as that upon performance of it the first taker should retain it.

As to authorities I shall cite first those that relate to personal estates; the case of *Escot* versus *Escot*, February 6, 1662. and mentioned 1 *Chan. Ca.* 144. was a devise to his nephews and nieces; to his nephews at twenty-one, to his nieces at twenty-one or marriage; but if they married without their mother's consent, then he devised it over; and the Court went so far in this case as to decree the legacy notwithstanding the devise over. The next is that of Sir *Henry Bellafys* versus Sir *William Ermine*, 1 *Chan. Ca.* 22. and agrees with the Register Book; the condition was, that she should marry with the consent of *A.* and if not, that she should have but 100*l. per ann.* The Court held this proviso to be only *in terrorem*. So *Garrett (e)* and *Pretty's* case, 2 *Vern.* 293. where, for want of a devise over, the condition was held to be but *in terrorem*.

(216) The true reason of this distinction is given in *Stratton* and *Grymes's* case, 2 *Vern.* 357. that a devisee over being named, he must be looked on as a person whom the testator considered and had in his thoughts as to what provision and benefit he was to have by the will. Indeed that of *Amos* versus *Horner*, *Abr. Eq. Ca.* 112. is contrary to the former determinations; but no resolution was there taken, (*f*) but it went off for want of parties, and never came on again. And in that of *Creagh* versus *Wilson* 2 *Vern.*

(*e*) In this case the daughter was held to be entitled to the portion though she married without consent, because it was not devised over, but only directed to *fall into the surplus*; but in the case of *Amos v. Horner*, the residuary bequest was held to be a sufficient devise over. So *Scott v. Tyler*, 2 *Bro. Cha. Rep.* 431.

(*f*) But Lord Chief Justice *Willes* in his argument in *Hervey v. Aſton* is reported to say of this case, "that though
"indeed

2 *Vern.* 572. the intent of the condition was to provide against his daughters marrying a papist; which, since the protestant religion hath been settled here, is a very good condition; and if the testator's intent be defeated in that respect, the legacy shall not be paid. Nor will these fortunes being chargeable upon land, vary the case; for, although they are to issue out of land, and are secured by deed, yet this being upon a direction of trust-money, though by deed, the Court will adjudge this limitation to be only *in terrorem*; the intent of the parties being as much to govern in construction of trusts, as in construction of wills: as is said by Lord Somers in *Sheldon* and *Dormer's* case, 2 *Vern.* 311. Nor is the case of *Fry* (g) versus *Porter* applicable to the present case; that being a condition annexed to a legal estate, and this being an equitable interest only. In *Farmer* and *Compton's* case, 1 *Chan. Rep.* 121. although the marriage was against consent, yet the daughter was held to take, by the opinion of two judges to whom it was referred. And in that of *Fleming* versus *Waldgrave*, 1 *Chan. Ca.* 58. the benefit of the lease was decreed to the administrator notwithstanding the devise over. Indeed in that of *Aston* versus *Aston*, 2 *Vern.* 452. the Court would not relieve, because of the express words of the devise over. The Lord *Falkland's* case, 2 *Vern.* 333. is not at all applicable to this case; nor will it be an authority almost in any case, from the peculiarity of its circumstances. That of *King* versus *Withers* reported in a book composed by the late Lord C. B. Gilbert, called *Reports in Equity*, 26. (and *Preced. in Chan.* 348.) is an express authority for the plaintiffs, although I cannot agree with what is there said,

“ indeed there is no decree to be found in the register, yet
 “ it appeared by the *Calendar* that a decree was made, but
 “ being against the plaintiff, he supposed it had never been
 “ drawn up.”

(g) 1 *Mod.* 300. 1 *Eq. Cas. Abr.* 112. S. C.

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that trust-money to arise out of land must have the same construction that the lands themselves would. So likewise is the determination in *Sempbill* (b) versus *Baily*, *Preced. in Chan.* 562. By all these various judgments it appears, that such clauses in restraint of marriage are never taken favourably, but generally restrained, as intended only *in terrorem*. In the present case it is a sum of money charged upon land; but there being no distinction between conditions annexed to money charged upon land and conditions annexed to portions arising out of the personal estate; and portions by will being due by ecclesiastical law notwithstanding such conditions as this annexed to them, portions by settlement (although under the like conditions) are likewise due by the law and rules of this Court; and therefore I think the plaintiffs well intitled to their several portions.

And so ordered, that Mr. *Hervey* should make his proposals before the master as to the settling his wife's fortune; and that Mrs. *Clutton's* fortune should be paid to her, her husband being dead. (i)

(b) This case was heard in the Duchy Court, *coram Lechmere Chan.* assisted by Lord Chief Justice *King*, and Mr. Justice *Dormer*, and the reason the chancellor and the chief justice went upon was, that the condition appeared to be a loose, inconsiderate expression, and besides there was no devise over. But Mr. Justice *Dormer* dissented.

(i) *Reg. Lib. A.* 1736. fol. 60. The Master of the Rolls seems to have determined this case upon a principle, that a condition annexed to money or portions charged upon lands, were entitled to the same equitable construction to avoid a forfeiture, as conditions annexed to portions arising from personalty, and that, notwithstanding the condition was a precedent one. But afterwards in *Trinity* term 1738, this decree was reversed by Lord *Hardwicke* *Chanc.* assisted by Lord Chief Justice *Lee* of the King's Bench, Lord Chief Justice *Willes* of the Common Pleas, and Mr. Justice *Comyns* of the same Court. They seem to have considered that portions or interests directed to be raised out of lands had nothing

thing testamentary in them, and therefore were not to be governed by the rules of the civil or canon, but by those of the common law: that no rule was more fixed, than that portions charged upon lands did not vest until the time of payment arrived: that the present condition to marry *with consent* was a lawful one, and a condition *precedent*, and that being such, nothing vested in the plaintiffs until that condition was performed. *Vide Comyns's Rep.* 726, S. C. 1 *Atk.* 361. S. C. where the reader will find the arguments of the judges, with the reasons which induced a reversal of the decree at the Rolls stated much at large. It seems therefore by this decision to be settled that conditions in restraint of marriage, so far as the same respect interests arising out of lands are to be governed by the rules of the common law, and therefore whether the condition be precedent or subsequent, or whether there be a devise over or not, the interest shall never vest until the condition be performed. *Vide Popham v. Bamfield*, 1 *Vern.* 300. *Bertie v. Lord Falkland*, 3 *Chanc. Caf.* 129. 2 *Freem.* 220, and 2 *Vern.* 333. *Fry v. Porter*, 1 *Chanc. Caf.* 138. 1 *Mod.* 340, S. C. *Pigot v. Morris*, *Sel. Caf. in Chanc.* 26. *Mansell v. Mansell* cited and stated in 2 *Bro. Cha. Rep.* 473. *Ambrose v. Ashby*, 4 *Burr.* 1429. But with regard to personal legacies the rule seems to be that the condition in restraint of marriage whether precedent or subsequent shall be void, unless there be a devise over, in which case, the right of the devisee over shall prevail. *Bellasis v. Ermine*, 1 *Chanc. Caf.* 22. *Sempill v. Bayly*, *Prec. in Chanc.* 562. *Pulleing v. Reddy*, 1 *Wilf.* 21. *Wheeler v. Bingham*, 3 *Atk.* 365. *Reynish v. Martin*, 3 *Atk.* 330. *Elton v. Elton*, 1 *Wilf.* 159. *Chancy v. Graydon*, 2 *Atk.* 616. *Daley v. Desbouverie*, 2 *Atk.* 261. *Underwood v. Morris*, 2 *Atk.* 184. *Hemmings v. Munckley*, 1 *Bro. Cha. Rep.* 303. So a gift of the *general residue*, without any specific bequest over, has been held to be effectual to defeat a legacy where the same is annexed to a condition to marry *with consent*, and the legatee afterwards marries *without consent*. *Amos v. Horner*, 1 *Eq. Caf. Abr.* 112. *Scott v. Tyler*, 2 *Bro. Cha. Rep.* 431. which seems to have settled this point, the contrary having been held in some antecedent authorities. *Garret v. Pretty*, 2 *Vern.* 293. 2 *Freem.* 220. S. C. *Wheeler v. Bingham*, 3 *Atk.* 365. *Paget v. Haywood* (cited 1 *Atk.* 378). The case of *Scott v. Tyler* (the latest authority upon this subject) was very elaborately argued, and the principles which the earlier and later authorities went upon very thoroughly investigated. By this decision therefore it should seem that a restraint imposed by

*Catherine Morrice, Widow
and Executrix of Hum-
phrey Morrice, deceased,* } Plaintiff;

*Governor and Company of
the Bank of England, and
other Creditors,* } Defendants.

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Case 48.

THE state of the case, as far as is material,
was as follows :

An execu-
trix of *A.*
who was
greatly in-
debted to
divers per-
sons, in

Mr. *Brown*, in the life-time of the testator, the husband of the plaintiff (*viz.*) in *October* 1720, made his will, and thereby gave to Mr. *Morrice* 16,500 *l.* in trust for his daughters,* to be paid to them, and the survivors of them, at twenty-one or debts of different natures, is sued in this court by some of them; appears and answers immediately, and confesses their bill, some of the plaintiffs here being her own daughters; other creditors sue the executrix at law (where she cannot plead the decree) and obtain judgments. The decree here being for just debts, is not *per fraudem*, and the creditors, plaintiffs at law, shall be enjoined, and the executrix protected in her obedience to the decree; the plaintiffs at law to come in afterwards in due course of administration, the whole being legal assets. The judgments of all courts at law, having proper jurisdiction, whether by grant or prescription, are equally binding. The decrees in this court are of equal force with judgments at law; and the real priority in point of time (and not by relation to the first day of a term) must give the preference in point of payment.

by a parent upon a child from marrying *without consent*, or until a certain age, &c. is a reasonable, and therefore a lawful one: that there is no distinction in the case of a personal legacy, or a portion payable out of money between precedent and subsequent conditions, whether the legacy shall vest, where the condition has not been performed, and there is *no devise over*: that a bequest of *the residue* is as effectual to defeat a personal legacy or a portion payable out of money, when the condition which is to vest the legacy has not been performed as a *specific devise over*.

mar-

marriage, which should first happen, share and share alike, together with such interest as should be made of the same. He gave several other legacies to other persons; and, subject to his debts and funeral expences, he gave all the residue of his real and personal estate to Mr. *Morrice*, his heirs, executors, &c. and made him sole executor. Mr. *Morrice* being a great trader contracted many debts, and died *November 16, 1731*, having made his will, and the plaintiff his executrix; his affairs being much embarrassed, and he standing indebted to several persons by specialty and otherwise in large sums of money, and particularly to the Bank of *England* for 35000 *l.* by simple contract, soon after his decease, and before any action commenced against the plaintiff by any of the creditors, the defendants *Anne, Judith and Elizabeth*, the daughters of Mr. *Morrice*, with some other few creditors, *December 15, 1731*, exhibited their bill against the plaintiff as executrix of her said husband, setting forth the several sums that Mr. *Morrice* was indebted to them respectively, and with which he was intrusted for their benefit, which remained unpaid, together with a great arrear of interest, and thereby prayed a decree for the payment thereof; Mrs. *Morrice*, the now plaintiff, immediately put in her answer, confessing the bill, and on the 25th of *January 1731*, the cause was heard upon bill and answer only; and the now defendants, Mrs. *Morrice's* daughters, obtained a decree, that the plaintiff should, out of the assets of her said husband, pay the said several sums of money so demanded in a course of administration. The plaintiff, in obedience to that decree, on the 4th of *February* following, paid out of her husband's assets to two of the daughters 10,111 *l.* in satisfaction of part of their demands under the decree. On the 16th of *December 1731*, some few other creditors, for smaller sums of money, filed their bills for the payment of several quantities of *South-Sea* stock and annuities, and *East-India* stock, that were transferred to Mr.

Mor-

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Morrice, in trust for them, praying that the several stocks, as remaining in Mrs. *Morrice's* name, might be transferred to proper trustees; and as to so much as Mr. *Morrice* had disposed of to his own proper use, the now plaintiff might be decreed out of her husband's assets to make good the same. Mrs. *Morrice* confessed this bill, and on the 2d of February 1731, a like decree with the former was made, that the plaintiff should pay what was certified by the master to be due (after an account was taken) out of the assets in a course of administration. All the defendants had notice of these decrees, from the plaintiff or her agent, so soon as they were made; and also notice that the assets of the said Mr. *Morrice* come to the defendant's hands were not sufficient to discharge their respective debts upon specialties; and that the sums of money decreed as aforesaid, except the said 10,111 l. before-mentioned to be paid, were yet unpaid, and the other parts of the decree wholly performed: while all this was doing, several other creditors brought their actions for their respective debts, against the plaintiff as executrix of her husband, and particularly the Bank of *England*, for 28,990 l. to which the defendant pleaded a special *plene administravit*, and would have pleaded several other bonds had she then been informed of the same; and also the two decrees had she been able by the rules of law so to have done, they being obtained before any plea pleaded. After this the now plaintiff filed her bill, setting forth all the above-mentioned particulars; and that by the rules of law she could not plead the said decrees to their several actions, or retain assets in her hands sufficient to satisfy them, or any way protect herself from the executions on the several judgments obtained against her; and therefore she prayed, that what should appear to be due to any one of the defendants might be respectively paid out of the assets of the deceased, so far as they would extend, in due course of administration, regard being had to the nature and superiority of their debts;

debts; and that the plaintiff might be protected and indemnified in paying a due obedience to the decrees of this Court; and that the defendants might be restrained from proceeding at law.

The *Bank* and other judgment creditors insisted, (220) that the decrees were fraudulent, and obtained by collusion between the now plaintiff and the other parties to those suits, to give an undue preference to the parties concerned therein: and they insisted farther, that as their debts were due upon judgments, they were to be paid before the decree creditors.

Sir *Joseph Jekyll*, Master of the Rolls, directed the (k) decree creditors to be first paid, as being prior in time; and after they were satisfied, then the surplus of the assets, if any, should be applied to the payment of the several judgments according to their priority, and the other creditors to be paid in a course of administration.

Lord Chancellor. The rule of this court, with regard to equitable assets, is to put all the creditors on an equal footing; so where the assets are partly legal (l) and partly equitable: and though equity cannot take away (m) the legal preference on legal assets;

(k) So *Joseph v. Mott*. *Prec. in Chanc.* 79.

(l) For the rule by which the court is governed in the marshalling of assets, vide *Masters v. Masters*, 1 P. Will. 422. *Clifton v. Burt*, *ibid.* 679. *Bligh v. Earl of Darnley*, 2 P. Will. 620. *Sagitary v. Hyde*, 1 Vern. 445. *Wilson v. Fielding*, 2 Vern. 763. *Lutkins v. Leigh*, ante 54. *Hastewood v. Pope*, 3 P. Will. 323. *Galton v. Hancock*, 2 Atk. 435, 437. *Martin v. Martin*, 1 Vef. 212. *Arnold v. Chapman*, *ibid.* 111. *Lacam v. Martins*, 1 Vef. 312. *Lanoy v. Duke of Athol*, 2 Atk. 446.

(m) For the difference between legal and equitable assets, vide *Freemoult v. Dedie*, 1 P. Will. 429. *Deg v. Deg*, 2 P. Will.

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sets; yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him till there is an equality in satisfaction to all the other creditors, out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. This is a matter that has been so often determined, that it will be unnecessary to cite authorities; and it is founded on this, that by natural justice and conscience all debts are equal, and the debtor himself is equally bound to satisfy them all. Indeed this Court, in the distribution of legal assets, follows the rule of law, which allows of preference to creditors, who have made use of legal diligence in getting in their debts. This Court and the courts of law, in that particular instance, have a concurrent jurisdiction; and bills are at this day brought against executors, not merely for a discovery of the assets, but also for such discovery, and a satisfaction of the debt; though the more antient way might be to bring a bill for a discovery only; and the reason of such bills is, that the creditor can have better aid in this court than he can at law; for he may have the oath of the executor for the discovery of assets. But as this Court hath only a concurrent jurisdiction upon legal assets with courts at law, and as such preference is allowed by law, there would be great confusion in the administration of legal assets if this Court did not in general follow the same rule here: and therefore it is upon that reason that courts of equity have departed from that rule which they had set to themselves, and borrowed from principles of natural justice. In the present case

2 P. Will. 415. *Cutterback v. Smith*, *Prec. in Chanc.* 127. *Bickham v. Freeman*, *ibid.* 137. *Allen v. Heber*, 2 *Strange*, 1270. *Plunket v. Penfon*, 2 *Atk.* 290. *Prowse v. Abington*, 1 *Atk.* 482. *Hargrave v. Tindal*, 1 *Bro. Cha. Rep.* 136 (cited). *Silk v. Prince*, 1 *Bro. Cha. Rep.* 138 (cited). *Newton v. Bennett*, 1 *Bro. Chan. Rep.* 135. *Batson v. Lindgreen*, 2 *Bro. Cha. Rep.* 94.

the assets are all legal; and the first question will be, whether any of those creditors, who stood on an equal footing at the death of Mr. *Morrice*, have gained a preference by what has happened since? Secondly, what will be the consequence of that with regard to the executrix, and whether she will be intitled to any, and what relief in this court? In this present case some are simple contract creditors, others are creditors by judgment, others by decree; and the general question at the bar has been, whether decree creditors are equal to judgment creditors or not? In the considering of this point some gentlemen have gone into the antiquity of the jurisdiction of the several courts of equity and law: but questions of that kind, unless they necessarily tend to give a determination to the matter in dispute, are greatly to be avoided. And that the present case does not depend on the antiquity of this court, or the extent of its jurisdiction, or whether it is a superior or an inferior jurisdiction, appears; for that judgments at law against the testator in courts commencing by grants, are equal to judgments in courts by prescription; and that the judgments of courts of general jurisdiction, as in *Westminster Hall*, and of courts of record of the narrowest jurisdiction, are all equal: which is a demonstration, that in consideration of law, it is not the antiquity of the court, nor the extent of its jurisdiction, or its being a superior or inferior court, that makes any difference with regard to the rank or order in which judgment creditors are to stand; and consequently it is plainly immaterial to enter into those matters: but the law seems to be founded in this, that the judgments of all courts, upon matters or persons within their jurisdictions, are conclusive so long as they are in force; and the parties are bound to yield obedience to them; and that obligation to perform them follows the assets in the hands of the executor or administrator. And if these matters are applied to courts of equity, I see no reason why a decree of equity ought not to be equal to a judgment

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ment at law: for, as judgments at law may be executed by a *capias ad satisfaciendum* to take the person, so similar to that are attachments for not performing decrees; (n) and although before the *statute* of Queen *Anne* an action of escape would not lie against the gaoler for letting the prisoners under such attachments escape; yet no argument can be drawn from thence to shew the imbecillity of decrees: for, though the act of parliament gives a new remedy, yet it affirms the jurisdiction of the court with regard to the power of taking up persons for not performing decrees. Judgments at law may be executed upon the goods by *feri facias*; decrees in this court, by sequestration. In this respect the process of this court is more effectual than by *feri facias* at law; for, there may be a sequestration against the goods, although the party is in custody upon the attachment: whereas at law, (o) if a *capias ad satisfaciendum* is executed, there can no *feri facias* issue. Indeed judgments at law bind lands, so that the party by *elegit* may have execution of a moiety by virtue of the statute, which ordinary decrees do not: yet there have been cases where even decrees have been held to bind lands, and where decrees are to hold and enjoy over. And such was the case of Lord *Carteret* and *Paschal*, 7 *Geo.* 2. before Lord *King*, Lord Chancellor, where the interest under such decree was taken to be similar to an estate by *elegit*; which shews this Court has considered decrees and judgments, and their several executions, as similar to each other. And as a *scire facias* may be brought at law to revive a judgment, so it may to revive a decree of this Court; and in that respect they agree, and in this also, that the original demand is gone both by a decree and a judgment, for

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(n) *Finch*, 253. *Gilb. Chanc.* 82, 83.

(o) *Vide Martin v. Therridge*, 3 *P. Will.* 248. Also *Hyde v. Petit*, 1 *Chanc. Cas.* 91. of the rise and progress of sequestration.

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transit in rem judicatam; and therefore I can see no reason why they should not stand on the same footing. Yet I am at the same time well apprised that the uniform judgments of courts of law have been otherwise: for, it is clear that a decree of this court, if an action is brought against an executor on a bond, is not pleadable, nor can be given in evidence against it. Why, I do not say, but that it hath obtained is certain: and the consequence is, that really the decrees of this Court are considered as nothing but the opinion of this Court, which, with regard to its own decrees, hath been different from that of courts of law, 2 *Vern.* 88. *Searles and Lane*, 3 *Lev.* 355. And if in the consideration of this court decrees are equal to judgments, a way is pointed out in 1 *Vern.* 143. for the party to defend himself against actions at law. If this Court hath any jurisdiction, decrees here must have the same lien upon assets as a judgment at law. And the case of *Joseph and Mott*, *Preced. in Chanc.* 79. is in point, that a decree prior in time must be preferred to a subsequent judgment; and if it was otherwise, the consequence would be, that this Court must give up its jurisdiction. *Darston and the Earl of Orford*, *Addis and Winter*, *Jones and Bradshaw*, 4 *May* 1661. (p) where an executor had paid assets in

(p) In the case of *Darston v. the Earl of Orford*, *A.* and *B.* were both creditors by specialty of *J. S.* who died, and left an executor, against whom *A.* brought a bill in equity for a discovery of assets, and to be paid his debt; and pending such suit, the executor voluntarily, and without suit, paid *B.*'s debts: upon an account decreed on *A.*'s bill against the executor, the latter craved an allowance of this payment; and it was decreed by the Lord Keeper *Wright*, that the executor should not have an allowance thereof, seeing, that before payment made, a bill in equity was brought by *A.* of which the executor had notice; and a bill in equity is equivalent to an action at law, pending which action an executor cannot make a voluntary pay-

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in pursuance of a decree of this Court; and on *plene administravit* at law he was not permitted to give such payment in evidence; but this court decreed it should be allowed him; which shews it hath always supported its jurisdiction, though its decrees would not be allowed at law. Upon this part of the case then, I think that decrees and judgments stand upon an equal footing, and that such as is first obtained against an executor ought to be first paid out of the assets. The next thing that arises for the consideration of the Court is, as to the priority of the decree creditors and the judgment creditors: and as to this matter, there is no doubt but the decree is prior in point of time; yet if the judgments are allowed to have relation to the first day of that term in which they were entered, then they will be before the decrees: but this Court must certainly attend to the truth of the fact. And though the general rule of the law is, that judgments relate to the first day (*q*) of the term, yet that is not quite so absolute and conclusive to courts of law themselves but it may be examined into, 1 *Sid.* 432. *Co. Lit.* 150. Then why may not a court of equity have the same privilege of examining into the exact time when a judgment was entered upon, or given, in order to prevent its jurisdiction from being defeated? and if it should be otherwise, the consequence would be that a decree, which was good

ment of any debt. From this decree an appeal was afterwards brought in the House of Lords, where the decree was reversed; and the reasons on which the Lords principally grounded their decree of reversal was, for that as the debts were of equal degree, and since a decree of the Court of Chancery cannot be pleaded at law to an action brought against an executor upon another of equal nature, therefore such executor might justify the payment of another debt of equal nature, even pending a bill in equity. *Prec. in Chanc.* 18. 3 *P. Will.* 400. note (*f*).

(*q*) *Vide Prec. in Chanc.* 478-9. anon. *Robinson v. Tonge*, 3 *P. Will.* 398.

when it was pronounced, would, by matter *ex post facto*, be overturned; and those assets would be taken away which were once bound by it. Another considerable objection has been taken relating to the nature of this demand; which is, that the decrees have been obtained *per fraudem*, according to the legal language; and as such matter might have been replied in case the decree should have been pleaded at law, therefore the other creditors ought in justice to be let into the same examination here: and it is certain, if they are fraudulent, nobody ought to have the benefit of them. As to what is said, that these decrees are *res inter alios acta*, and so ought not to hurt the other creditors, that has no weight with me; for, the same may be said of all judgments at law. And though these decrees were obtained in a manner by confession, for I take them to be so, as Mrs. *Morrice* put in her answer in a short time, and thereby confessed the demand of the plaintiffs, and also as she appeared *gratis* at the hearing of the cause, thereby forwarding the plaintiffs more than they could otherwise be by the rules of the court; yet courts of law hold it to be no objection if a judgment is pleaded that was obtained by confession, though there is favour shewn by the executor; nor upon a replication of *per fraudem* is it any evidence of fraud if there was a real and just debt. As to bills of conformity, indeed the case of *Buckle and Atleo*, 2 *Vern.* 37. is a case where they have been allowed; but they have since been discountenanced; and the reason is, because this court is satisfied that they have no right to take away the preference that one creditor gains over another by his legal diligence. Besides, that such bills may be made use of by executors to keep people out of their money longer than they would otherwise be: but in this case the executrix cannot be said to give preference, but wants to have it determined who hath gained a preference according to the rules of law and equity. Mrs. *Morrice* comes here for protection; and if this court doth not protect

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test her, she will be liable to a double satisfaction; first, to pay the assets to the decree creditors, and afterwards to the judgment creditors; and it is certainly proper for the executrix to come for protection to this Court, when she finds herself troubled for yielding obedience to the decrees of it. But then it is said on the other hand, that she has brought herself into this distress, and therefore ought not to be relieved: yet, with regard to the law, it must be owned that what she hath done is strictly right: for, an executor may confess a judgment (r) to one creditor, and plead it in bar to the demand of others. And the original foundation of such liberty being given to an executor, might be to prevent the trouble of two demands when he had assets only to satisfy one: and then by parity of reason, an executor may suffer decrees to be against him as it were by confession: and as the Court hath never controlled an executor in such liberty, or in retaining, if he insists on it; so what Mrs. *Morrice* has done is neither contrary to the rules of law or equity. And though it would have been much clearer had these decrees been obtained in a more adversary manner, yet as they are for just debts, they must be paid according to their priority. It has been said at the bar, that the judgment creditors have both law and equity, and the decree creditors equity only; and therefore that the Court ought not to take away the benefit of the law from the judgment creditors: but that has always been where equities were of the same nature; for, where one equity has been of a superior nature, that superior equity has been preferred: as in the case of *Taylor and Wheeler*, *Salk.* 449. where the question was, whether an assignee of a commission of bankruptcy, or a mortgagee under a defective conveyance, should be preferred? And it was held that

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(r) Vide *Waring v. Dawson*, 1 P. Will. 296.

the mortgagee should, his equity being specifically a lien upon the lands. So in the present case, at the time of Mr. *Morrice's* death, the equity of all the creditors was equal; but when the decrees were obtained, they bound the assets in the hands of Mrs. *Morrice*, and being prior to the judgments, ought to be first satisfied. As the proceedings at law now stand, there being judgment *de bonis propriis* against the executrix, unless this Court enjoins their proceedings, they will be paid out of her pocket; therefore they must be enjoined, as by the *Master of the Rolls* his decree: but as they are tied up at law, they must have a direction to the master to take an account of the effects which are first to be applied in discharge of the decree creditors, and the residue to the several judgment creditors according to their priority, and so on in a course of administration.

Upon the whole, the decree of the *Master of the Rolls* was confirmed, (s) with an alteration only, by deducting for the daughters' maintenance after their attaining the age of twenty-one years, and the additional direction on behalf of the judgment creditors.

(s) This decree was afterwards, on the 28th of April, 1737, upon an appeal to the House of Lords, affirmed, 4 *Bro. Cha. Rep.* 287. Lord *Hardwicke* afterwards, in *Smith v. Styles*, 2 *Atk.* 385. recognizes and admits this case to have fully established the doctrine, viz. that a decree of the Court of Chancery is equal to a judgment at law, and consequently that which is first obtained will be first paid. In what other cases decrees of this Court bind, and gain a preference, vide *Martin v. Martin*, 1 *Ves.* 214. *Douglas v. Clay*, 1 *Bro. Cha. Rep.* 183. (cited). *Brooke v. Adams*, 1 *Bro. Cha. Rep.* 183.

Case 49.

Partridge versus Partridge.

A. devises 1000 *l.* capital *South-Sea* stock to *B.* at the time of making his will he had 1800 *l.* such stock, and after, by sale, reduced it to 200 *l.* which he after increased to 1600 *l.* and died. Between the making his will and his death, the act took place, which changed three fourths of the capital *South-Sea* stock into annuities: this legacy is not taken away nor impaired by the sale, nor

THE testator by his will devised 1000 *l.* capital *South-Sea* stock to his wife for life, for her sole use and benefit, with power to dispose of the same to such of her children as she should think fit. At the time of making his will he was possessed of 1800 *l.* *South-Sea* stock: he afterwards reduced such stock to 200 *l.* but after that purchased as much as made up the 200 *l.* to be 1600 *l.* and afterwards died in July 1733. In June next before his death* the act took place for changing three fourths of the capital *South-Sea* stock into annuities. The questions made upon this case were, first, whether the testator selling 1000 *l.* part of his 1800 *l.* *South-Sea* stock, after the making his will, should not be considered as an ademption of the legacy? If not, secondly, if the act for turning *South-Sea* stock into annuities should not be so considered? In the argument of this case, the case of *Ashton* and *Ashton* (t) was cited, where the testator devised 6000 *l.* *South-Sea* stock to *J. C.* and at the time of his death and will was possessed of only 5500 *l.* *South-Sea* stock; upon which a bill was brought against the executor to have it made up 6000 *l.* But the *Master of the Rolls*, and after him the *Lord Chancellor*, on appeal, were of opinion the deficiency should not be supplied, upon this principle, that as general (u) lega-

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(t) *Ante* 152. 3 *P. Will.* 384. S. C. The testator there intended to give only what he was possessed of, and it was of great weight in that resolution, that a trust was declared to sell and dispose of the stock, for it could not be supposed that the testator intended his executor should buy stock, and immediately sell the same again, and buy land with the money.

(u) For the distinction between a *specific* and *general* legacy, vide *Hinton v. Pinke*, 1 *P. Will.* 540. and the cases collected

tees have no lien on what is given to specific legatees, so a specific legatee shall have no lien on the general fund of the testator; but if any loss happens to what is specifically given to him, he must bear the burden thereof himself.

Lord Chancellor. All cases of ademption of legacies arise from a supposed alteration of the (x) intention of the testator; and if the selling out the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much particular stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in the case at bar, to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again. As to the second point, after such devise, the legislature thought proper to make a law to change three fourths of the stock into annuities, and the fourth to remain as it stood before; so that the testator, when he died, was possessed of 1200*l.* annuities, and 400*l.* stock; and it would be extremely hard to say, that this alteration of the stock by parliament (y) should work an ademption, when it cannot be presumed the testator's intent was particularly

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led by Mr. Cox in note (1). *Purse v. Snaplin*, 1 *Atk.* 414. *Attorney General v. Parkyn*, *Ambl. Rep.* 566. *Ashburner v. Macguire*, 2 *Bro. Cha. Rep.* 109.

(x) So *Hambling v. Lister*, *Ambl. Rep.* 402.

(y) So *Bransdon v. Winter*, *Ambl. Rep.* 57. S. P.

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asked,

asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do. (z)

If an obligee was to devise a legacy of 1000*l.* secured by bond from *A. B.* and he should afterwards compel *A. B.* by due course of law to pay it him, this would be an ademption of the legacy; but it was never thought, if *A. B.* should pay in the money voluntarily, (a) it would be an ademption, because the obligee is bound to receive it.

Case 50.
13 December.

Stephens versus Stephens.

An executory devise of an estate of inheritance to a person unborn when he shall attain the age of twenty-one years, is

THERE were five causes which were heard together by the late Lord Chancellor *King*; and upon the hearing he directed a *case to be stated, and referred to the Judges of the King's Bench for their opinion*; and it now came back for the judgment of the Court, upon the Judges' certificate; upon reading of which, the present Lord Chancellor was pleased to decree according to it, and expressed

is good: and there is no danger of a perpetuity.

(z) *Reg. Lib. B.* 1736. fol. 81.

(a) The distinction between a voluntary and compulsory payment has in some cases been allowed; as in *Crocket v. Crocket*, 2 *P. Will.* 165. *Rider v. Wager*, *ibid.* 339. *Orme v. Smith*, 1 *Eq. Cas. Abr.* 302. pl. 2. in the above case of *Partridge v. Partridge*, and before Lord Hardwicke in *Lawson v. Stinch*, 1 *Atk.* 508. But in the Earl of *Thomond v. the Earl of Suffolk*, 1 *P. Will.* 467. *Ford v. Fleming*, 2 *P. Will.* 469. *Ashton v. Ashton*, 3 *P. Will.* 386. the distinction is not approved of. So in *Drinkwater v. Falconer*, 2 *Ves.* 624. *Hambling v. Lister*, *Ambl. Rep.* 401. a compulsory payment was considered not to be in itself sufficient evidence of an intention in the testator to adeem. Lord Camden again, in the *Attorney General v. Parkyn*, *Ambl. Rep.* 566. held the distinction not to exist, and his opinion was afterwards adopted by Lord Thurlow in *Ashburner v. Macguire*, 2 *Bro. Cha. Rep.* 109.

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his satisfaction with it, as agreeing perfectly with his own sentiments; and said, he hoped it would be for the future a leading case in the determinations of all questions of this kind. (b) The case stated, and the opinion of the judges, were as follow:

Sir *William Stephens* being seised of the several messuages, lands and tenements herein after-mentioned, made his will the 15th day of *February* 1712, whereby (*inter alia*) he made the several devises in the words following: “ *Item*, I give, devise
 “ and bequeath unto my grandson *William Stephens*,
 “ after the decease of my said wife dame *Susanna*
 “ *Stephens*, all those my messuages, lands, tene-
 “ ments and hereditaments, situate, lying, and
 “ being in *Deptford* in the county of *Kent*, and by
 “ deed settled by my said wife on me, my heirs and
 “ assigns, to hold the same to my said grandson *Wil-*
 “ *liam Stephens*, his heirs and assigns for ever. *Item*,
 “ I give, devise and bequeath to my said grandson
 “ *William Stephens* all my freehold estates, messu-
 “ ages, lands, tenements, hereditaments and pre-
 “ mises in the parish of *St. Mary Magdalen, Ber-*
 “ *mondsea*, in the county of *Surry*, situate and being
 “ in *Rotberhitb Wall, East Lane, St. Mary Magda-*
 “ *len Court-yard*, and elsewhere in the said parish of
 “ *St. Mary Magdalen, Bermondsea*; and also all
 “ those my freehold messuages, lands, tenements,
 “ hereditaments and premises in the parish of *St.*
 “ *Olave in Southwark*, and elsewhere in the county
 “ of *Surry*; and also all my freehold messuages,
 “ lands, tenements and hereditaments in the county
 “ of *Essex*, to hold my said freehold messuages, lands,
 “ tenements, hereditaments and premises to my
 “ said grandson *William Stephens*, his heirs and as-
 “ signs for ever: but in case my said grandson *Wil-*
 “ *liam Stephens* shall happen to die and depart this
 “ life before he attains his age of twenty-one years,
 “ then I give and bequeath to my grandson *Thomas*
 “ *Stephens* all and every my messuages, lands and

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(b) Reg. Lib. B. 1736. fol. 120.

“ here-

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“ hereditaments before mentioned, as well those in
 “ the parishes of *St. Mary Magdalen, Bermondsea,*
 “ and *St. Olave, in Southwark,* as those in the
 “ counties of *Essex and Kent,* to hold the same to
 “ my said grandson *Thomas Stephens,* his heirs and
 “ assigns for ever: but in case my said grandson
 “ *Thomas Stephens* shall happen to die and depart
 “ this life before he attains his age of twenty-one
 “ years, then I give and bequeath all my said free-
 “ hold messuages, tenements, hereditaments and
 “ premisses whatsoever before mentioned to such
 “ other son of the body of my daughter *Mary Ste-*
 “ *phens,* by my son-in-law *Thomas Stephens,* as shall
 “ happen to attain his age of twenty-one years, his
 “ heirs and assigns for ever; the elder of such sons
 “ to take place before the younger, one after an-
 “ other in order and course as they and every of
 “ them shall be in seniority of age and priority of
 “ birth, and of the several and respective heirs
 “ male of the several and respective body and bo-
 “ dies of all and every such son and sons, and the
 “ heirs male of his and their body and bodies is-
 “ suing; and for default of such issue, then I give
 “ and bequeath my aforesaid freehold estates, mes-
 “ suages, lands, tenements and hereditaments to all
 “ and every the daughter and daughters of my said
 “ son *Thomas Stephens* on the body of my said
 “ daughter to be begotten, and to the heirs of the
 “ body and bodies of all and every the said daugh-
 “ ter and daughters, as tenants in common, and
 “ not as jointenants; and for want of such issue,
 “ then I give, devise and bequeath my aforesaid
 “ freehold estates, messuages, lands, tenements and
 “ hereditaments to my brother *Sir Richard Stephens,*
 “ to hold the said freehold messuages, lands, tene-
 “ ments and hereditaments to the said *Sir Richard*
 “ *Stephens,* his heirs and assigns for ever. *Item,*
 “ all the rest and residue of my estate, real and per-
 “ sonal, goods, chattels, rings, jewels, plate, mo-
 “ ney and monies-worth whatsoever and wherefo-
 “ ever not hereby before bequeathed, I give and
 “ be-

“ bequeath the same to my said son *Thomas Stephens*,
 “ his heirs, executors, administrators and assigns
 “ for ever.” And the said testator, by his said
 will, made his said son-in-law *Thomas Stephens*
 sole executor thereof. And afterwards (to wit)
 on or about the 15th day of *March* following died,
 leaving Dame *Mary*, the wife of *Thomas Ste-*
phens, his daughter and heir, and leaving two
 grandsons, *William* and *Thomas*, living at the time
 of his death, and no grand-daughter. On the
 18th of *May* 1713, *Susan*, the daughter of *Tho-*
mas Stephens and *Mary* his wife, was born, and is
 still living; the said *Thomas Stephens* the grandson
 died without issue, and under the age of twenty-one
 years, the 24th day of *October* 1714; and the said
William Stephens, the other grandson, died the 14th
 day of *September* 1718, without issue, and under
 the age of twenty-one years; *Mary Stephens*, an-
 other daughter of the said *Thomas Stephens* and
Mary his wife, was born the 14th of *March* 1719,
 and died without issue and under age the 26th of
October 1722; *Sarah Stephens*, another daughter of
 the said *Thomas Stephens* and *Mary* his wife, was
 born the 13th of *November* 1721, and is yet living;
Mary Stephens, another daughter of the said
Thomas Stephens and *Mary* his wife, was born the
 15th of *February* 1722, and died without issue and
 under age the 26th of *April* 1723; *Thomas Stephens*,
 one of the parties in this suit, son of the said Sir
Thomas Stephens and *Mary* his wife, was born the
 12th day of *January* 1727, and is still living; Sir
Richard Stephens, the said testator’s brother, men-
 tioned in his will, is still living: the said *Thomas*
Stephens claims title to the premisses as residuary de-
 visee of the said testator; and the said Dame *Mary*
 his wife lays claim thereto as heir at law to the said
William Stephens the testator; and the said other
 parties likewise claim title thereto under the said
 testator’s will; *Susan Stephens*, the plaintiff in the
 original cause, since the hearing the said causes (to
 wit)

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wit) the 14th of *April* 1734, died without issue and under age; and on the 6th of *August* following an order was obtained upon the petition of all the surviving parties, that the case should be made agreeable to the fact, as it now stands since her death, and that the judges of the Court of *King's Bench* be then desired to give their opinion on this question, what estate, right or interest, either in the present or in contingency any of the said parties have in or to the lands in question, or any part thereof?

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The judges of the *King's Bench* certified their opinion as follows: we have heard counsel for all the parties, and maturely considered the case upon which the question is raised and referred to us; and the principal point appears to be, whether the devise made by the will in these words, *viz.* "And
 " in case my said grandson *Thomas Stephens* shall die
 " before he attains his age of twenty-one years, then
 " I give all my said freehold estates, &c. to such
 " other sons of the body of my said daughter *Mary*
 " *Stephens*, by my son-in-law *Thomas Stephens*, as
 " shall happen to attain his age of twenty-one years,
 " his heirs and assigns for ever," be good by way of executory devise? As to which we do not find any case wherein an executory devise of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor* and *Bydall*, adjudged upon a special verdict in the Court of *Common Pleas*, *Hill. 29 & 30 Car. 2.* and reported in *2 Mod. 289.* That resolution appeared in every view of it to be so considerable in the present case, that we caused the record to be searched, and find it to agree in the material parts thereof with the printed report: and therefore, however unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors; yet upon the authority of that judgment, and its
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conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and that this construction will make the testator's whole disposition take effect, which otherwise would be defeated; we are of opinion, that the devise before mentioned may be good by way of executory devise.

The consequence whereof is, that all the subsequent limitations will be good; the estate will vest in *Thomas*, the son now living, when he shall attain the age of twenty-one years in tail male, according to the clause directing the order of succession between the sons to be born; if *Thomas* the son, now living, should happen to die before his age of twenty-one years, and the testator's daughter *Dame Mary Stephens* should have any other son by *Sir Thomas Stephens*, then the estate will go over to him when he shall attain his age of twenty-one years, in like manner as it would have vested in *Thomas*; if *Thomas* the son should die before the age of twenty-one years, and *Dame Mary* should have no other son by *Sir Thomas Stephens* who should attain his age of twenty-one years, then his estate will go over to *Sarah* the daughter, and all other daughters of the said *Dame Mary* by *Sir Thomas*, as tenants in common in tail, with remainder over to *Richard Stephens* the testator's brother in fee: but in case *Thomas* the son should die before the age of twenty-one, and *Sarah* the daughter should then be dead without issue, and there should be no other son of *Dame Mary* who should attain the age of twenty-one years, or any other daughter hereinafter born of their bodies, then the estate will go over to the said *Sir Richard Stephens*, by virtue of the last remainder to him in fee. As to the profits of the estate received since the death of *William* the grandson, or to be received

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received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder-man, we conceive that they belong to Sir *Thomas Stephens* by virtue of the residuary devise in the will, as an interest in the testator's real estate not before bequeathed or disposed of by his will. (c)

Hardwicke,
F. Page,

E. Probyn,
W. Lee.

(c) *Vide Clare v. Clare, ante 26, and references.*

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Term. S. Hillarii

10 Geo. II.

IN CURIA CANCELLARIÆ.

Savage versus Taylor.

Case 51.

WILLIAM Taylor made his will, bearing date May 25, 1727, and thereby devised to trustees and their heirs all his messuages, lands, &c. in *Cherrington*, in com. *Gloucester*, to the use of *Mary* his wife for life, remainder to trustees for five hundred years, to raise 400*l.* for her as she should appoint, or in default thereof to her executors, remainder to the use of the testator's nephew *John Taylor* in tail remainder to *William Taylor*, son of the testator's brother *Humphrey* in fee, and makes *Mary* his wife sole executrix and residuary legatee; and by a codicil *October* 27, gives two cottages to two servants in fee, and 20*s.* per ann. to the poor of *Cherrington*. Before the making this will the testator had a fit of the palsey, which impaired his health, but did not affect his understanding: in *August* 1728, he had a second fit of the palsey, which deprived him of his speech, and greatly impaired his understanding. *January* 31, 1728, after a treaty between one *Savage* and the testator, which was chiefly managed by the testator's wife and one *Nathaniel Thomas* her relation, articles were entered into by the testator and his wife of the one part, and *Savage* of the other part, for sale of the testator's estate in *Cherrington* to *Savage* in fee, for 2080*l.* and a guinea. In *July*

deliver up the articles and account for the profits; otherwise, if he goes to law, and fails there.

There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this Court will not set them aside; but will refuse its aid to carry them into execution. And if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to

1729, the testator died; and about *November 1732*, *Mary* the testator's widow died, having made her will, and the plaintiff *Savage* sole executor and residuary legatee. *John* the nephew, the first devisee of the testator, died soon after the testator's wife, leaving one son named *John Taylor*. The plaintiff *Savage* brought his bill in the life-time of *Mary*, but not long before her death, against her, and against *John Taylor* the testator's eldest brother and heir at law; against *John* the nephew, and *William* the nephew an infant, the two devisees in the will; and also against the trustees, and the devisees in the codicil; for a specific performance of the articles, and to have conveyances accordingly. *John Taylor* the heir at law died in 1735, having put in his answer, and leaving *John* his grandson and heir at law. A second bill was brought by *William Taylor* the infant devisee, intitled in fee under the will, to establish the will, and to be relieved against the articles. (d) And a third bill was brought by *John Taylor*,

(d) It being charged in his bill, that the defendant *Savage* was a purchaser of the estates comprised in the articles, with notice of the settlement in 1683, *Savage* admitted by his answer (though before or at the time of the execution of the articles he had not actual notice of the settlement) that he had heard it talked, that part of *William Taylor*'s estate had been settled on the plaintiff's grandfather's marriage; but that it was also reported, that the said settled estate was fairly sold to the said *William Taylor* for a valuable consideration; and further admitted, that after the execution of the said articles several deeds relating to the said estates were delivered to him, among which were indentures of lease and release, dated the 16th and 17th days of *May*, 1683, purporting to be a settlement made upon the marriage of *John Taylor* the younger (the plaintiff's grandfather,) and made between *John Taylor* the elder, and *John Taylor* the younger his son and heir, of the first part; *Hannan Whiting*, of the second part; and *John Whiting* and *Thomas Taylor*, of the third part; in consideration of a marriage agreed to be had between the said *John Taylor* the younger,

Taylor, an infant, grandson and heir at law of *John*, against *Savage*, to discover a settlement made 1683, and to have the same delivered up to him, under which he claimed a moiety of the estate comprised in the articles of purchase; and against *William Taylor* the infant, disputing the will, claiming the other moiety as heir at law. *John Taylor*, great

younger, and *Hannah Whiting*, and of 500*l.* portion paid to the said *John Taylor* the younger, the said *John Taylor* the elder and *John Taylor* the younger, did grant, &c. all their estate in *Cher- rington* to the said *John Whiting* and *Thomas Taylor*, their heirs and assigns, to the use of the said *John Taylor* the younger for 99 years, without impeachment of waste, remainder to *John Whiting* and *Thomas Taylor*, and their heirs, for the life of the said *John Taylor* the younger, to support contingent remainders, remainder to *Hannah Whiting* for life for her jointure, remainder to the heirs of the said *John Taylor* the younger, with divers remainders over, remainder to the right heirs of the said *John Taylor* for ever. That by lease and release, bearing date respectively, the 27th and 28th days of *March*, 1692, and made between the said *John Taylor* and his wife (the plaintiff's grandfather and grandmother) of the one part, and *William Taylor* of the other part, the said *John Taylor* and his wife, in consideration of 1000*l.* did grant, release, and confirm all or most of the premises comprised in the said settlement, to the use of the said *William Taylor*, his heirs and assigns for ever, in which was a covenant for quiet enjoyment and further assurance: and by indenture, bearing date the 29th of *March*, 1694, and made between the said *John Taylor* the younger and his wife, of the one part, and the said *John Taylor* the elder and the said *William Taylor*, another of the sons of the said *John Taylor* the elder, of the other part, in consideration of 1000*l.* paid by the said *John Taylor* the elder and *William Taylor* to the said *John Taylor* the younger, the said *John Taylor* the younger, and his wife covenanted to levy a fine before the then next *Easter Term*, which was levied accordingly of the said lands comprised in the said settlement, the use whereof was declared to be to the use of the said *John Taylor* the elder and *William Taylor*, their heirs and assigns for ever; and the said defendant submitted whether the said plaintiff's right and title to the said premises was not barred by the said fine. *Reg. Lib. B.* 1736. fol. 209.

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grandfather of the infant *John*, had issue four sons, *John*, *William*, *Thomas*, and *Humphry*. *John* the grandfather had issue *John*, who married and died in the life-time of his father, leaving *John* the great grandson, the plaintiff in the third bill. May 17, 1688, *John Taylor* the great grandfather, and *John* his son, in consideration of a marriage to be had between *John* the son and *Hannah Whiting*, conveyed the estate in question to trustees, to the use of *John* the son for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders during his life, remainder to *Hannah* his wife for her jointure, remainder to the heirs of his body in special tail, remainder to the heirs of his body in tail general, remainder to the right heirs of *John* the great grandfather. March 29, 1694, *John* the grandfather and *Hannah* his wife, in consideration of 1000*l.* paid by *John* the great grandfather and the testator *William*, covenant to levy a fine *sur consance de droit come ceo*, &c. to them with warranty. Easter Term 6 & 7 of *Will.* and *Mary*, a fine was levied between *John Taylor*, sen. and *William* the testator, complainants, and *John Taylor* and *Hannah* his wife, deforceants. Easter Term, 9 *Geo.* 1. *William Taylor*, the testator, levied a fine, but no deed leading the uses thereof appeared.

Lord Chancellor stated the three bills, and the design of them, and added to this effect: the first question is with regard to the articles under which the plaintiff claims, whether he is intitled to have the benefit of them? which depends on two considerations; 1. whether the articles are such as a court of equity will set aside? and if the court will not, whether the plaintiff shall have its assistance by decreeing a specific performance of them? It is certain this Court, in cases of articles, has a discretionary power to carry them into execution or not; and if it appears they are unfairly obtained, though not to such a degree as to set them aside, yet this Court will not order a performance, but will

will leave the plaintiff to his remedy at law. And upon the whole matter, I am clearly of opinion this Court ought not in this case to aid the plaintiff: but if upon the prospect of having the articles performed the plaintiff has improved the estate, it is reasonable he should have an allowance for lasting improvements; provided he is content to deliver up the articles, and to account for the profits; otherwise, if he goes on at law, he must not expect it.

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The next question is, as to the title upon the settlement in 1683. whether the remainder under which *John* claims is barred in point of law by the first fine; the uses of which are declared by the deed of *March* 29, 1694. And in that fine there was a warranty, which was contended to be collateral, and to bar the right of *John* by descending upon him. And undoubtedly the warranty is collateral to the title of *John*, who claims by purchase, and not from the person who made the warranty; and as this was before the *Stat. 4 & 5 2. Anne, (e) cap. 16.* (how hard and unreasonable soever it may be) there is no room for a court of equity, which cannot alter the law, to interpose. But to this two answers have been given, either of which seems sufficient; (1st,) that this warranty descended on an infant, and therefore is no bar to him: (2d,) that supposing it to work a wrong, and to displace and divest the estates, then it is a warranty commencing by disseisin, and so commencing by a tortious act, the law did not allow such effect as if it was not attended with that circumstance; for, collateral warranties are grounded on this presumption, that no one would bind the estate of his heir without leaving him a satisfaction, but when he who makes the

This Court will not relieve against a collateral warranty created before *statute 4 Anne, cap. 16.*

(e) By which stat. all collateral warranties by any ancestor who has no estate of inheritance in possession are rendered void against his heir.

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warranty does a tortious act, it seems that presumption ceases. Then the next question to be considered is, whether the fine and non-claim, by the Stat. 4 H. 7. cap. 34. has barred this contingent remainder? If it is considered as a fine levied by tenant for ninety-nine years, determinable on his death, it is not a bar; but an averment may be taken, that *partes finis nil babuerunt*; and it is a forfeiture of his estate, if the parties over will take advantage of it; otherwise it is a nullity, and will not take away the entry of the trustees when their right takes place. It is said this case differs from the common case of a fine levied by tenant for years; for, here the wife joined in the fine, who had an estate for life; and if that had been a freehold, properly so called, then it might have a greater effect than a fine levied by tenant for years: but in this case that freehold lies behind the limitation to trustees to preserve contingent remainders; and then it is hard to say the fine shall so operate as to displace the precedent estate for life limited to the trustees. But supposing this fine did displace the estates, and should be considered in the same way as a fine levied by tenant for life in possession; the consequence would be, that the trustees might enter immediately, or within five years after the determination of the estate for life. But then it is said, that though a right of entry in the trustees is sufficient to preserve contingent remainders, yet the right of entry which the trustees had, is quite gone in this case by the death of *John*, who was tenant for ninety nine years if he should live so long; because his estate, and the estate of the trustees determined *eodem instante*: but that is not so certain; for, the estate of the trustees might subsist after the estate of *John* determined, if he out-lived the ninety-nine years; which the law supposes may happen; for, then the trustees might enter, because their estate is for his life: so they had a possibility to enter after the estate of *John* was determined, and during his life. And though that did not take place, yet their right was
not

not clearly gone and extinguished; and therefore it may be considered, whether that possibility of entry within five years after the determination of ninety-nine years is not sufficient to support the contingent remainder? I should think courts of law should go a great way to support such remainders, which could not be destroyed without this practice, I had almost said iniquity; but this is properly a legal question, and not determinable here. And the same things may be said with regard to the other fine levied afterwards, and farther also, that it is not certain that it includes these lands now in question. Thus far is clear, that the plaintiff in the third bill has a right to have the deed of 1683. and *valeat quantum valere potest*: there is another point very considerable in this case, upon a supposition that the contingent remainder is barred in point of law. If there is tenant for life, remainder over to some other person, so as to be in contingency, if the tenant for life makes a feoffment, or levies a fine without trustees to preserve the contingent remainders, in point of law they are barred: but it is a most barbarous thing to rob persons unborn of their inheritance, and to give it to one who has no colour of title; yet hard and unjust as it is, I do not remember this Court has ever interfered so far as to direct a conveyance to him in remainder. (f) In the case of *Manfell* and *Manfell* there were trustees to preserve contingent remainders, who were drawn in to destroy them; and this court considered the matter as a breach of trust, and followed the lands in the hands of a purchaser with notice. This is a kind of middle case; for, here is no actual breach of trust by any act done; but if the contingent remainder is barred, it is by their neglect to perform the trust, and that in the single instance for which they were appointed trustees; that is, to bring actions, and make entries: and it may deserve con-

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(f) So *Pye v. George*, 1 P. Will. 129.

sideration how far one who has notice shall avail himself by this neglect of the trustees; but I will not enter into a case of this consequence unnecessarily, but will reserve a liberty of considering it when it comes back to the Court for farther directions after the trial.

It was decreed, that upon *Savage's* submitting to give up the articles to be cancelled, his bill, so far as it prayed a performance of them, should be dismissed; and that he should account for the rents and profits of the estate by him received, and should be allowed for his lasting improvements. That an ejectment should be brought to try the right of the whole estate, both of that in settlement and that out of settlement, and no term to be set up; and in this ejectment *John* to be lessor of the plaintiff, and *William* defendant: that the deed of 1683. should be delivered up to *John*, and *William* to have a copy of it at his own charge; and that the other deeds and writings shall be brought before the master; and that *William* should admit himself in possession, and that after trial the parties should resort back for farther direction,

D E

Term. S. Michaelis

8 Geo. II.

IN CURIA CANCELLARIÆ.

Brown versus Selwin, & contra.

Case 52.
1734.

JOH^N Brown, on the 23d of June 1732. made his will, and thereby bequeathed to the plaintiff a legacy of 500*l.* and all his plate; to the defendant he gave all his leasehold messuages; and after several other legacies and bequests, as well as devising some freehold and copyhold lands, he devised as follows: “and as for the rest, residue and
“remainder of my estate, whether real or personal,
“whereof I am seised or possessed, or which I am
“any ways intituled to, which I have not herein and
“hereby devised, given, &c. I give and bequeath
“the same, and every part thereof, and all my right,
“title and interest therein and thereto, unto such
“my executor or executors herein after named, as
“shall duly take on him or them the execution of
“this my will, according to the true intent and
“meaning thereof, his or their heirs, executors,
“administrators and assigns, as tenants in common,
“and not as jointenants;” and afterwards appointed the plaintiff and defendant his executors, and
admitted, that the testator intended to release it to the obligor, and instructions for that purpose to an attorney who drew his will, &c.

A. devises the residue of his real and personal estate, not before devised, to his two executors, &c. as tenants in common, &c. One of them is indebted by bond to the testator. This bond-debt is not released, but shall be divided between them; and no parol evidence shall be admitted, had given in-

soon after died; and the plaintiff and defendant proved the will. The defendant was at the time of the testator's death indebted to the testator in 3000*l.* principal money, besides interest, and for securing thereof had given a bond to the testator, dated the 20th of *June* 1732. in 6000*l.* penalty: the bill was brought that the defendant might account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said 3000*l.* and interest; and the cross bill was to have the bond delivered to be cancelled. (g)

It appeared by the answer of the defendant in the original cause, and by the proofs in both causes, that the testator designed to give this money to the defendant; and gave one *Viner*, the attorney concerned in drawing the will, instructions in writing accordingly; but *Viner* refused to make mention of it in the will, insisting that the bond would be extinguished and released of course by Mr. *Selwin*'s being appointed executor; but the testator appearing dissatisfied with *Viner*'s opinion, a case was stated for counsel's opinion, who confirmed what *Viner* said: in confidence of which the testator signed and published his will, with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

Lord Chancellor. The question is, whether 3000*l.* which was due to the testator from Mr. *Selwin*, shall pass to Mr. *Selwin* by his being made executor? or, whether it passed by the devise of the residue to the two executors? The written instructions for drawing the will directs the 3000*l.* all to Mr. *Selwin*. The attorney who was to draw the will says it was the testator's intention it should go so: but that he, apprehending that making the obligor executor was an extinguishment of the debt, hindered it from being

(g) *Reg. Lib. A. 1733. fol. 220.*

particularly mentioned. It was never doubted but a debt due from an executor to a testator shall be assets in the executor's hands to pay debts; (b) for, if the testator had expressly given it away, even that could not have screened it from debts: so the testator may give a legacy out of a debt due to him, as in the case in *Yelv.* 160. *Flud v. Rumsey*, which authority is right; the implied gift, by making the debtor executor, may be controlled by an express gift, or by a devise of all his debts. (242)

It hath been questioned whether such a debt be assets (i) to pay legacies in general; but that not being the present case, it is not necessary to be determined: I am at present inclined to think it may; but shall not bind my self by giving my opinion till the case happens. If this be considered upon the will, without the parol evidence, it will appear clearly from the general words of devising the residue, (*i. e.*) *all his real and personal estate which he had not thereby before given to the residuary legatees*; that this debt, which at that time was part of the personal estate, falls within the description: the testator was intitled to this debt when he made his will, and at the time of his death; he had not before disposed of it, nor had he appointed Mr. *Selwin* executor. A devise of the residue after payment of debts and legacies plainly comprehends this debt; and the only doubt is with regard to Mr. *Viner's* evidence, who wrote the will. I privately think that it was intended the 3000*l.* should go to Mr.

(b) *Plowd.* 184. *Wankford v. Wankford*, 1 *Salk.* 299. 303. 1 *Roll. Abr.* 921. 2 *Black. Com.* 511, 512. *Carey v. Goodinge*, 3 *Bro. Cha. Rep.* 119. in which the appointment of a debtor, executor, to whom a legacy was at the same time given, was determined to be no release of the debt, and the executor held to be a trustee as to the residue for the next of kin.

(i) *Vide Phillips v. Phillips*, 1 *Chanc. Caf.* 192. also 3 *Chan. Caf.* 89.

Selwin.

Selwin. Privately I think so ; but I am not at liberty, by private opinion, to make a construction against the plain words of a will. None of the cases where parol evidence has been admitted have gone so far as the present case ; the farthest they go is to rebut an equity (k) or resulting trust ; the parol

(k) As in *Doxey v. Doxey*, 2 Vern. 677. *Littlebury v. Backley*, *ibid.* (cited). *Batchelor v. Searle*, 2 Vern. 730. *Petit v. Smith*, 1 P. Will. 9. *Lady Granville v. Dutcheffs of Beaufort*, 1 P. Will. 550. *Heron v. Newton*, 9 Mod. 11. *Gale v. Croft*, 8 Vin. Abr. 195. pl. 25. *Rachfield v. Careless*, 2 P. Will. 158. *Lady Osborne v. Villiers*, 2 Eq. Cas. Abr. 410. *Mallabar v. Mallabar*, ante 80. *Brasbridge v. Woodroffe*, 2 Atk. 68. *Ulrich v. Litchfield*, 2 Atk. 373. *Blinkhorne v. Feast*, 2 Vef. 28. *Lake v. Lake*, 1 Wils. 313. *Ambl. Rep.* 126. S. C. *Lowfield v. Stoneham*, Str. 1261. *Earl of Inchiquin v. O'Brien*, 4 Burn's Eccl. Law, 122. *Kelly v. Pawlet*, 1 Bro. Cha. Rep. 476 (cited). But notwithstanding, in some cases extremely dark and doubtful, such evidence has been received to assist the judgment of the Court, as in *Fane v. Fane*, 1 Vern. 30. *Hodgeson v. Hodgeson*, 2 Vern. 593. *Oldham v. Lichford*, *ibid.* 506. *Cuthbert v. Peacock*, *ibid.* 594. *Pendleton v. Grant*, *ibid.* 517. *Strode v. Russell*, *ibid.* 621. *Harris v. Bishop of Lincoln*, 2 P. Will. 136. *Rosewell v. Bennet*, 3 Atk. 77. *Goodinge v. Goodinge*, 1 Vef. 231. *Hampshire v. Peirce*, 2 Vef. 216. *Fonnereau v. Poyntz*, 1 Bro. Cha. Rep. 475. So Lord Hardwicke in 2 Atk. 375, is reported to say "He was of opinion that in the case of *Brown and Selwyn* the parol evidence ought to have been received, and that Lord Talbot rejected it with no small degree of reluctance, though the House of Lords affirmed his decree, deeming the admission of the evidence to be of the most mischievous consequence." But Lord Hardwicke afterwards in *Ulrich v. Litchfield*, 2 Atk. 372. laid down the rule of courts both of law and equity in the admission of parol evidence, in the case of wills to be only, 1st. to ascertain the person, where there are two of the same name, or where there has been a mistake in the christian or surname, and this upon absolute necessity, to prevent the will from being rendered void, as in *Cheyney's case*, 5 Co. 68. 2dly. to rebut a presumption raised in favour of the next of kin against the legal title of the executor to the residue

rol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will, as in the present case. It is better to suffer a particular mischief than a general inconvenience, and so reversed the decree, and ordered Mr. *Selwin* to account with the plaintiff *Brown* for the said 3000*l.* but no costs.

This was upon an appeal from the *Rolls*.

This cause, the 26th of *March*, 1735. came before the *House of Lords* upon an appeal, and the *Lord Chancellor's* decree was affirmed: and the lords would not allow the parol evidence to be read, nor even the respondent's answer as to these (1) matters.

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fidue of his testator's effects: though for this latter purpose his *Lordship* afterwards in *Blinkborne v. Feast*, 2 *Ves.* 28. expresses some doubt of the propriety of admitting such evidence. However the above case of *Brown* and *Selwyn* seems to have fully established the rule, that no parol evidence, to supply, or contradict the words of a will, or to explain the intention of the testator, is admissible, where the words used are unambiguous and intelligible. So *Stratton v. Payne*, 3 *Bro. P. C.* 257. *Errington v. Broughton*, 7 *Bro. P. C.* *Chamberlayne v. Chamberlayne*, 2 *Freem.* 52. *Cole v. Robinson*, 1 *Salk.* 244. *Maybank v. Brooks*, 1 *Bro. Cha. Rep.* 85. But if it is doubtful out of what fund a legacy given by a testator is to arise, or where there is an ambiguity with respect to the subject to which the words of the will (though clear in themselves) are to be applied, it should seem parol evidence is admissible to explain and remove the doubt. *Fonnereau v. Poyntz*, 1 *Bro. Cha. Rep.* 474.

(1) 4 *Bro. P. C.* 180.

≡ see addenda * 296 attend of
this volume

De Gols versus Ward.

Case 55.

Whether an act of bankruptcy may be purged by length of time? and, whether creditors after an act of bankruptcy shall come in under the commission, or only have their remedy against the person of the bankrupt? on whose petition a commission shall issue?

THE defendant *Ward* became indebted to the plaintiff in 1730. and afterwards committed an act of bankruptcy; upon which the plaintiff, being the petitioning creditor, took out a commission of bankruptcy against the defendant; and in order to over-reach and make void as many of his conveyances and settlements, &c. as possible, the creditors on a bill filed endeavoured to prove him a bankrupt as far backward as they could; and did actually prove, to the satisfaction of the Court, that he committed an act of bankruptcy in the year 1726. Then it became a question, whether the commission of bankruptcy, and all that was done under it, was not wrong, in regard that the debt of the petitioning creditor, on which it was grounded, was contracted subsequent in time to the first act of bankruptcy? After this matter had been argued and time taken to consider of it,

Lord Chancellor declared, it was clear that no body but a creditor could take out a commission of bankruptcy against another; for, that the acts of parliament were all made for the relief of creditors; and likewise that such commission must issue on the petition of some creditor who could be relieved under it. Now if the debt is subsequent to the act of bankruptcy, the creditor cannot come in under the commission against the effects of the bankrupt, though the person of the bankrupt himself will be liable. The general rule is not to determine the time of the bankruptcy, but only that the person was a bankrupt antecedent to the commission; for, then all the creditors before that time will have a right to come in: but when that matter is minutely entered into, it must be distinguished which creditors are precedent, and which are subsequent to the act of bankruptcy. If the defendant became a bankrupt in 1726. then the petitioning creditor is out of the case; but if not till 1730. when the plaintiff's debt

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debt was subsisting, then all is right. What puzzles the case is, that the assignees have been over diligent, and in order to rescind as many of the defendant's acts as they could, have endeavoured to prove him a bankrupt as far backwards as possible; by which they have cut up their own foundation by proving an act of bankruptcy in 1726. Then the difficulty is, whether the act of bankruptcy in 1726. cannot be considered as purged, (m) being near ten years since, and no commission taken out upon it? I am most inclined to direct an action of *trover*, in which the jury will consider whether the defendant was a bankrupt in 1726. or not; and if they pay no regard to it, I am sure I will not.

Then Mr. *Fazakerley* objected, that the Court would never direct a trial at law, unless it appeared doubtful whether he was a bankrupt in 1726. which he said, was not the present case. And, he said, it was never determined that an act of bankruptcy could be waived or purged.

The *Lord Chancellor* dismissed the plaintiff's bill without prejudice.

Note; This decree was reversed in the *House of Lords*, by the opinion of all the judges, (n) *February* 17, 1737.

(m) It should seem that an act of bankruptcy, if once plainly committed, can never be purged. *Worsley v. Demattos*, 1 *Burr.* 484. But if the act was doubtful, then circumstances may explain the intent of the first act, and shew it not to have been done with a view to defraud creditors. *Ex parte Hall*, 1 *Atk.* 201, *et vide Cooke's Bank. Laws* 129.

(n) Lord Chief Justice *Lee*, who delivered the opinions of the judges, saying, that as the commission issued when the *old statutes* relating to bankrupts were in force, they had considered it upon the foot of *those old statutes*, and that they were all of opinion that the petitioning creditor *being a creditor at the time the commission issued*, the commission therefore was good and valid in law. 4 *Bro. P. C.* 327. *S. C.* *Sed vide e contra Cooke's Bank. Laws* 24, 25. and the cases there cited.

*Jane Sabbarton, an infant, by Thomas Parr, Esq;
her next friend,*

versus

*Benjamin Sabbarton, Dulcibella Sabbarton, Widow,
Robert Kidwell, William Sabbarton, an Infant, by
the said Robert Kidwell, his Guardian, Joel Pocock,
Giles Pocock, Sarah Pocock, and Thomas Diggles
and Sarah his Wife. (o)*

Case 54.

J. S. by will,
reciting that
a marriage
is proposed
between his

JOSEPH Sabbarton, late of London, merchant,
made his will, dated April 20, 1710. and so
much thereof as regards the present question is in
niece *A.* and his cousin *B.* devises to trustees divers freehold houses, &c. and
the rents due, or to become due, and money in the orphans' fund, and the pro-
duce of the same, and Bank stock, and money due thereon, in trust to pay the
rents and profits to *A.* if living at his decease, during life, or to such person
as she by writing should appoint, with or without the consent of any husband;
but if she should marry *B.* then, after the decease of *A.* in trust for *B.* during
life, and after his decease in trust for the first and other sons successively of *A.*
and *B.* and their heirs male; and for want of such issue in trust for the daugh-
ters of *A.* and *B.* equally to be divided between them, and for want of issue of
that marriage, in trust for the issue of the survivor of them; and if neither of
them leave issue, in trust for *C.* for life, with remainder for such child and
children, as his brother *D.* should leave living at his decease, or that *D.*'s wife
should be *ensent* of, that should attain the age of twenty-one, and to the heirs,
executors, &c. of such child, &c. as they should respectively attain the age of
twenty-one years; and if none attain that age, to his own right heirs: but if
A. should not marry *B.* then in trust after her decease for *C.* for life, remainder
for the child and children of *D.* *ut supra*, and if none attain the age of twenty-
one, to his own right heirs; and devised the residue of his estates, real and per-
sonal to *A.* and *C.* equally to be divided between them, their heirs, executors,
&c. and made others executors, and died. *A.* and *B.* intermarried; *B.* died
without issue; *C.* married, and died without issue; *A.* died without issue,
having made her will, and appointed an executor; *D.* died before *A.* leaving
issue two sons, *E.* and *F.* above twenty-one years of age; *E.* died (before *A.*)
intestate, leaving *G.* a daughter an infant, now living; *F.* is also living; the
orphan's fund and Bank stock were not transferred but remain as at the testator's
death: the bequests of these (considered as a bequest of a term for years in
lands) to the child and children of *D.* *ut supra*, is held to be good as this case
has happened.

(o) Ante 55. S. C.

the

the words following (that is to say) “ And whereas
 “ a marriage is proposed to be had and solemnised
 “ by and between the said *Catherine Corr* and *Ben-*
 “ *jamin Sabbarton*, jun. eldest son of my cousin *Ben-*
 “ *jamin Sabbarton*, sen. of the city of *Norwich*,
 “ weaver. Now I do hereby devise and bequeath
 “ unto the said *Thomas Botterell* and *John Young*,
 “ and the survivor of them, and the heirs, exe-
 “ cutors and administrators of such survivor, all that
 “ my freehold house, out-houses, barn, coal-house,
 “ stable, gardens and orchards at *Enfield* in the
 “ county of *Middlesex*, which I lately purchased of
 “ *Patience Ashfield*; and also all and every my free-
 “ hold houses, messuages, lands, tenements and
 “ hereditaments situate in or near *Queen-street* and
 “ *Bow-lane*, *London*, or either of them, or any court
 “ or courts adjacent thereunto, which I lately pur-
 “ chased of *John Kalendar* and *Edward Kalendar*, or
 “ either of them, together with such rents as shall
 “ be due and in arrear for the same premises at the
 “ time of my decease, and after that shall become
 “ due; and also the sum of 287*l.* 1*s.* 3*d.* in the
 “ orphans fund of the chamber of *London*, and the
 “ interest, increase and produce of the same fund
 “ that shall be due at the time of my decease, and
 “ after that becomes due and payable; and also the
 “ sum of 350*l.* capital stock in the corporation of
 “ the *Bank of England*, and all monies due thereon
 “ at the time of my decease, or that shall thereafter
 “ become due and payable for the same, to and for
 “ the several uses, trusts, intents and purposes
 “ hereafter mentioned, limited and declared (that is
 “ to say) in trust that they the said *Thomas Botterell*
 “ and *John Young*, and the survivor of them, and
 “ the heirs, executors and administrators of such
 “ survivor shall pay, or cause to be paid, all and
 “ singular the said rents, issues, profits and produce
 “ of all the said messuages, lands, tenements and
 “ here-

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" hereditaments at *Enfield*, and in or near *Queen-*
 " *street* and *Bow-lane*, *London*, and orphans fund in
 " the chamber of *London*, and *Bank* stock, to the
 " said *Catherine Corr*, if living at the time of my
 " decease, and not otherwise, quarterly, half-year-
 " ly or otherwise, as the same are and shall become
 " due, paid and payable, for and during the term
 " of her natural life, or unto such person or persons
 " as she shall by any writing under her hand direct
 " and appoint, with or without the consent of any
 " husband she may have; and whether the hereby
 " proposed marriage, or any other marriage of her
 " to any other person, may or shall happen, or not-
 " withstanding she shall never marry; but in case
 " she the said *Catherine Corr* do or shall marry the
 " said *Benjamin Sabbarton*, jun. then that they the
 " said *Thomas Botterell* and *John Young*, and the sur-
 " vivor of them, and the heirs, executors and ad-
 " ministrators of such survivor, shall, from and af-
 " ter the decease of the said *Catherine Corr*, stand
 " seised, interested and possessed of the said pre-
 " mises, in trust for the said *Benjamin Sabbarton*,
 " jun. for and during the term of his natural life;
 " and from and after his decease, then in trust to
 " and for the first son lawfully begotten of the said
 " *Catherine Corr* and the said *Benjamin Sabbarton*,
 " jun. and the heirs male of such first son, and so
 " on successively to the second, third, fourth and
 " fifth, and all and every other son and sons of the
 " said *Catherine Corr* and *Benjamin Sabbarton*, jun.
 " as they shall stand in seniority of age and priority
 " of birth, and their heirs male respectively; and
 " for want of such issue male, then in trust to and
 " for the use and behoof of the daughter and daugh-
 " ters lawfully begotten of the said *Catherine Corr*
 " and *Benjamin Sabbarton*, jun. equally to be di-
 " vided between them share and share alike; and
 " for want and in default of any lawful issue of the
 " hereby

“ hereby proposed marriage between the said *Catherine Corr* and the said *Benjamin Sabbarton, jun.*
 “ then in trust to and for all the issue male and fe-
 “ male lawfully begotten of the body of the survi-
 “ vor of them, equally to be divided between them
 “ share and share alike; and in case neither of them
 “ shall leave any (p) lawful issue, then in trust to
 “ and for my said sister *Sarah*, for and during the
 “ term of her natural life; and from and after her
 “ decease, in trust to and for the only proper use
 “ and behoof of all such child and children lawfully
 “ begotten, as my said brother *John* shall at the
 “ time of his death leave living, or that his wife
 “ shall be then *ensient* or in child with, that shall
 “ live and attain to the age of twenty-one years,
 “ and to the heirs, executors, administrators and
 “ assigns of such child and children, equally to be
 “ divided between them share and share alike, as
 “ they shall respectively attain the said age of twen-
 “ ty-one years; and in case no such child of my
 “ said brother *John* shall live to attain the said age
 “ of twenty-one years, then I give, devise and be-
 “ queath the said house, out-houses, barn, stable,
 “ coal-house, gardens and orchard at *Enfield*, houses,
 “ lands, tenements and hereditaments in or near
 “ *Queen-street* and *Bow-lane*, *London*, and orphans
 “ fund in the chamber of *London* and *Bank*, to my
 “ own right heirs for ever; but in case the said *Ca-*
 “ *therine Corr* shall not marry the said *Benjamin Sab-*
 “ *barton, jun.* then in trust that they the said *Tho-*
 “ *mas Botterell* and *John Young*, and the sur- of
 “ them, and the heirs, executors and administrators

(248)

(p) There seems to be no diversity betwixt a devise of a term to one for life, and *if he die without issue*, remainder over, and a devise thereof to one for life, with such remainder, *if he die leaving no issue*; for both these devises seem equally relative to the failure of issue at any time after the testator's death. 1 *P. Will.* 665. *Sed vide e contra*, 1 *Bro. Cha. Rep.* 191.

Y

“ of

“ of such survivor, shall, from and immediately
 “ after the decease of the said *Catherine Corr*, stand
 “ seised, interested and possessed of the said last
 “ mentioned premisses, in trust to and for my said
 “ sister *Sarah*, for and during the term of her natu-
 “ ral life; and from and after her decease, in trust
 “ to and for the only proper use and behoof of all
 “ such child and children lawfully begotten as my
 “ said brother *John* shall at the time of his death
 “ leave living, or that his wife shall be then *ensient*
 “ or in child with, that shall live and attain the
 “ age of twenty-one years, and to the heirs, exe-
 “ cutors, administrators and assigns of such child
 “ and children, equally to be divided between
 “ them, share and share alike, as they shall re-
 “ spectively attain the said age of twenty one years;
 “ and in case no such child of my said brother *John*
 “ shall live to attain the said age of twenty-one
 “ years, then I give, devise and bequeath the said
 “ last mentioned premisses to my own right heirs
 “ for ever.” And as to the residue of the said tes-
 “ tator’s estate, he by his said will disposed thereof in
 “ the words following, *viz.* “ All the rest, residue
 “ and remainder of my ready money, plate, rings,
 “ jewels, clocks, watches, notes, bills, bonds,
 “ mortgages, household goods, and all other my
 “ estate and estates, as well real as personal, where-
 “ soever and whatsoever, either in possession, rever-
 “ sion or expectancy, after my debts and funeral
 “ charges shall be fully paid and satisfied, I give,
 “ devise and bequeath unto my said sister *Sarah* and
 “ the said *Catherine Corr*, equally to be divided be-
 (249) “ tween them, to hold unto them my said sister
 “ *Sarah* and the said *Catherine Corr*, their heirs,
 “ executors, administrators and assigns for ever;
 “ and I do hereby make, constitute and appoint my
 “ said sister *Sarah* and the said *Catherine Corr* my
 “ joint residuary legatees. (q)

The said testator appointed *George Vergoe* and *Thomas Pilkington* executors of his said will, and died sometime in the month of *January 1710.* without revoking or altering the same; and the said executors proved the said will, and the trust is now vested in the defendant *Diggles* and his wife. The marriage proposed between *Benjamin Sabbarton* the younger and *Catherine Corr* took effect after the death of the said testator; and *Sarah*, the testator's sister, about the 28th of *March, 1713.* intermarried with the defendant *Robert Kidwell*, and died without issue the 9th of *August, 1721.* and he is her administrator. The said *Benjamin Sabbarton* the younger died the 2d of *December, 1718.* without ever having had any issue, and the said *Catherine* his wife survived him, and died on the 7th of *September, 1733.* without having ever had any issue, having made her will, and thereof appointed the said *Kidwell* executor in trust, who proved the same. *John Sabbarton*, the said testator *Joseph Sabbarton's* brother, died about the 19th of *November, 1729.* leaving issue two sons, namely *Joseph Sabbarton* and *Benjamin Sabbarton*, then both of the age of twenty-one years and upwards. *Joseph Sabbarton*, the eldest son of the said *John Sabbarton*, the said testator's said brother, died in *January, 1729.* intestate, leaving issue only one child, *Jane* an infant, now living; and the said *Benjamin*, the other son of the said *John Sabbarton*, is also living; and neither the said sum of 287*l.* 1*s.* 3*d.* in the orphans' fund, or the said 350*l.* Bank stock have been ever transferred; but the same remain in the same condition as they did at the time of the making of the said will by the said testator.

Upon the hearing of two causes before the late Lord Chancellor upon the said 15th of *November, 1736.* one between the said *Jane Sabbarton* the infant, by her next friend, plaintiff, and the said *Benjamin Sabbarton* (her uncle) *Robert Kidwell*, and *Thomas Diggles* and his wife, and others defendants;

and the other between the said *Robert Kidwell*, plaintiff, and the said *Thomas Diggles* and his wife, *Jane Sabbarton*, *Benjamin Sabbarton* and others, defendants; it was ordered (amongst other things) that a case be made for the opinion of his Majesty's Court of *King's Bench*, on the following question:

If a term for years in lands had been bequeathed in the same manner as the trust of the orphans and *Bank* stock is limited by this will, whether the limitation to all such child and children lawfully begotten as the testator's brother *John* should at the time of his death leave living, or that his wife should be then *ensient* or with child with, that should live to attain the age of twenty-one years, and to the heirs, executors, administrators and assigns of such child or children equally to be divided between them share and share alike, as they should respectively attain the age of twenty-one years, whether that would have been good in the case that hath happened? (r)

On

(r) Whether the words "dying without issue" in the case of a limitation of chattels real or personal are to be construed to mean a general failure of issue, or such a failure as is to happen within the compass of a life, has been a question of much diversity of opinion in the books. *Donne v. Merrifield*, ante 56. (cited). *Forth v. Chapman*, 1 P. Will. 663. *Nicholls v. Hooper*, ibid. 198. *Hughes v. Sayer*, ibid. 534. *Nicholls v. Skynner*, *Prec. in Chanc.* 528. *Keily v. Fowler*, 6 Bro. P. C. 309. *Pinbury v. Elkin*, 1 P. Will. 563. *Prec. in Chanc.* 483. *S. C. Pleydell v. Pleydell*, 1 P. Will. 748. *Target v. Gaunt*, ibid. 432. *Maddox v. Staines*, 2 P. Will. 422. *Stanley v. Leigh*, 2 P. Will. 686. *Higgins v. Dowler*, 1 P. Will. 98, the above case of *Sabbarton v. Sabbarton*, *Atkinson v. Hutchinson*, 3 P. Will. 258. *Read v. Snell*, 2 Atk. 647. *Exel v. Wallace*, 2 Ves. 318. *Sheffield v. Lord Orrery*, 3 Atk. 288. *Chamberlain v. Jacob*, *Ambl. Rep.* 72. *Sheppard v. Lessingham*, ibid. 124. *Lamp-
ley*

On hearing counsel on both sides, and consideration of this case, we are of opinion, that if a term for years in lands had been bequeathed in the same manner as the orphans and *Bank* stock is limited by this will, the limitation to all such child and children lawfully begotten as the testator's brother *John* should at the time of his death leave living, or that his wife should be then *ensient* with that should live to attain the age of twenty-one years, and to the heirs, executors, administrators and assigns of such child or children, equally to be divided between them share and share alike, as they should respectively attain the age of twenty-one years, would have been good in the case that hath happened.

W. Lee, E. Probyn,
F. Page, W. Chapple.

ley v. Blower, 3 *Atk.* 396. *Knight v. Ellis*, 2 *Bro. Cha. Rep.* 574. are cases in which the Court held that the words, "if the first devisee died *without issue*, must be intended to mean without issue *living at his death*." But according to the decision of several modern cases it should seem as if the Court had adopted a different rule of construction, *viz.* that the words "*dying without issue*," will *prima facie* be intended to mean an indefinite failure of issue, unless the contrary appears from other circumstances. *Richards v. Lady Abergavenny*, 2 *Vern.* 324. *Clare v. Clare*, ante 21. *Green v. Rodd*, 2 *Atk.* 308. (cited). *Milward v. Milward*, *ibid.* (cited). *Beauclerk v. Dormer*, 2 *Atk.* 308. *Saltern v. Saltern*, *ibid.* 376. *Earl of Stafford v. Buckley*, 2 *Ves.* 181. *Butterfield v. Butterfield*, 1 *Ves.* 133. 154. *Attorney General v. Hird*, 1 *Bro. Cha. Rep.* 170. *Bigge v. Bensley*, 1 *Bro. Cha. Rep.* 187. *Earl of Chatham v. Tothill*, 6 *Bro. P. C.* 450. *Glover v. Strothoff*, 2 *Bro. Cha. Rep.* 33. *Fearne's Com. Rem.* 368.

Case 55.
11 April,
1728.

Thomas versus Hole.

A devise to relations is to be confined to such as would take by the statute of distributions: but their shares may not be the same as under that statute.

ONE Hole by his will gave 500*l.* to the relations of Elizabeth Hole to be divided equally between them. Elizabeth Hole had at the testator's death two brothers living, and several nephews and nieces by another brother. The cause came on to be heard before my lord King, and two questions were made; in the first place, who should take by this description of the relations of Elizabeth Hole? It was said, that in the case of *Brown and Brown* my Lord Macclesfield had determined that the word relations should be confined to such relations as were within the statute of distributions, because of the uncertainty of (s) the word relations; and upon this authority my Lord King determined, that no relation should take by this description that could not take by the statute of distributions. The next question was, in what proportions such relations should take, whether as they would have taken by the statute, or in a different manner? And as to this he determined, that as the testator had directed the 500*l.* to be divided equally among them, he could not direct an unequal distribution, and accordingly decreed them to take *per capita*. (t)

(s) So *Car v. Bedford*, 2 Cha. Rep. 146. 2 Eq. Cas. Abr. 365, S. C. *Roach v. Hammond*, Prec. in Chan. 401. 1 P. Will. 327. Anon.

(t) The authority of this case has not only been recognized by, but seems to have governed the decision of many subsequent cases, in which, words of the same, or of a similar import have been used, as in *Edge v. Salisbury*, Ambl. Rep. 70. *Isaac v. Desfiez*, *ibid.* 595. *Widmore v. Woodroffe*, *ibid.* 636. *Harding v. Glynn*, 1 Atk. 469. *Whithorne v. Harris*, 2 Ves. 527. *Green v. Howard*, 1 Bro. Cha. Rep.

31. *Hands v. Hands*, Hil. 1782, at the Rolls, 3 *Bro. Cha. Rep.* 69 (cited). *Phillips v. Garth*, 3 *Bro. Cha. Rep.* 64. *Rayner v. Mowbray*, 3 *Bro. Cha. Rep.* 234. *Vide also Beale v. Jones*, 2 *Vern.* 381. *Brunsdon v. Woobridge*, *Ambl. Rep.* 507. *Bennet v. Honeywood*, *ibid.* 709. in which last case a bequest to the testator's brother amongst such of his (testator's) poor relations as he should think fit, was held not to be confined to the next of kin.

DE
Term. S. Trinitatis

6 Geo. II.

IN CURIA CANCELLARIÆ.

Case 56.
1732.

Mansell versus Mansell. (u)

THIS cause came on upon an appeal to my Lord Chancellor King from the decree of the Master of the Rolls.

Trustees to preserve contingent remainders for children unborn, join to defeat them; this is a breach of trust relievable in

equity; and where there is not a purchaser for a valuable consideration without notice, the estates shall be re-conveyed to the former uses.

Edward Vaughan seised in fee in 1683. devised lands to his sister *Dorothy*, afterwards the plaintiff's mother, for life, remainder to trustees to preserve contingent remainders, remainder to the use of her first and other sons in tail male, remainder to the use of his cousin *Edward Mansell* in fee, and charges the estate with a debt of 1200*l.* and dies.

The plaintiff's mother intermarried with Sir *Edward Mansell*, and in 1685. they, with the remainder-man in fee, join in a feoffment, with a covenant to levy a fine to trustees to the use of the plaintiff's father in fee; and this is exprest to be to

(u) 2 *P. Will.* 678. S. C.

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the intent that the fee simple might be vested in him for the raising of money for the payment of the debts of *Edward Vaughan* the testator (whose inheritance it was) by demising, selling or mortgaging the estate or any part thereof, and for other good causes and considerations a fine is levied accordingly at the grand sessions in *Carmarthenshire*, where the lands lay. About a year after, the trustees, to preserve contingent remainders, reciting the will, feoffment and fine, convey the whole estate by lease and release to the plaintiff's father in fee, *Dorothy* being then with child, and then the plaintiff is born. Afterwards the father by will makes the plaintiff tenant for life, &c. and dies.

The plaintiff brought his bill to have the benefit of Mr. *Vaughan's* will, and insisted on the breach of trust; and that the parties who claim under the fine and feoffment, being parties to the breach of trust ought not to take advantage of it.

The defendant in his answer insisted on the fine and feoffment.

The *Master of the Rolls* decreed for the plaintiff for so much as was not aliened *bona fide*.

It was argued for the plaintiff by Mr. *Attorney General*, that the estate ought to be preserved by the trustees according to the intent of the deed of trust; that their joining with the tenant for life in the alienation was a high breach of trust; and that had they aliened to one who had no notice of the trust the remedy should be against them; but where with notice, the parties claiming under the trust should make good the estate; and so held by the Lord *Harcourt* in *Pye* and *George's* (x) case, in *Salk*,

(x) 1 *P. Will.* 128. S. C. also 1 *Bro. Parl. Ca.* 359. where it is stated at large.

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reports: which is stronger than our case; for, those we claim against are all voluntiers under Sir *Edward Mansell's* will. Mr. *Vaughan's* estate being subject to a charge of 1200*l.* it cannot be supposed that Sir *Edward Mansell* and the trustees should bar the remainders to prevent them coming to the first and other sons of *Dorothy*, who was his wife; but merely to discharge that debt, which a court of equity would, upon a bill brought, have decreed to be done by sale. Where-ever a conveyance has been made for a particular purpose, and no particular limitation of the estate after that purpose performed, it has been always looked on as a resulting trust for the heir, or for such to whom the inheritance belongs; there are many cases where it has been so held. 2 *Vern.* 52. *Baden* versus *Earl of Pembroke*.

It was also insisted, that old Sir *Edward Mansell* had in an answer (formerly put in to another suit in this Court) allowed that the plaintiff would be intitled in equity to an estate tail under Mr. *Vaughan's* will.

Mr. *Solicitor General*, Mr. *Verney* and Mr. *Ryder*, after the proofs read, added, that their claiming only against devisees under Sir *Edward Mansell's* will, and not against any purchasers either with or without notice of the trust, obviated all objections that could be made on that head; and that where a voluntier claims under a breach of trust, without any consideration paid, and with notice of the trust, it would be unconscionable he should take advantage of it; but he shall hold the estate liable to the trust. *Pye* and *George's* case, though not a case directly adjudged, yet was a very strong declaration by the Court.

Trustees to preserve contingent remainders were found out to help the defect in the law of the first son's not being able to take advantage of the forfeiture of the tenant for life by making a feoffment,
because

because not *in rerum natura* at the time of the forfeiture committed: and at law, before the statute of uses, if a feoffee to uses had enfeoffed another with notice of the uses, the second feoffee would have held the estate subject to and for the use of the *cestui que trust*; and trustees are appointed to preserve and not to destroy contingent remainders. Then taking it on the other side, this does not seem so much a breach of trust as a just and legal act, to take off that charge which lay on the estate, and to secure that very intail which they were trustees for, and would have been destroyed by a sale; for, the acts done by the husband and wife are recited in the deed to be done only in order that the estate may be settled on the husband, to and for the raising such sums as the estate is chargeable with; and it is the greatest equity they should be taken to this particular purpose only, it being a lawful one: for, where a deed may be taken in a double sense, the just and equitable one shall be preferred.

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Neither is it to be supposed the wife would have joined in the disherison of her children, but only to make Sir *Edward Mansell*, her husband, a trustee for this special purpose of discharging the estate. In all cases of raising of terms for one purpose, after that purpose served, the term shall attend the inheritance, though no trust appointed after the serving of the purpose. *Lowther* versus *Lowther*, heard at the *Rolls* the last term. And so whether it is considered as a rightful act, or whether it is taken as a breach of trust, and so a wrongful one, the plaintiff ought to be relieved; and so *quâcunque via data*, the decree ought to be affirmed.

Mr. *Lutwych*, Mr. *Willes* and Mr. *Mead* argued on the other side for the defendant, and said, that it was not pretended that the legal estate was well vested in Sir *Edward Mansell* by his father's will: but they object that there has been a contrivance to defeat the plaintiff not then born of that intail which he

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he would otherwise have had. It was not the feoffment that destroyed the contingent remainder; for, therein the trustees were not concerned, but it was the release: and it is observable that here is no purchaser, but only voluntiers claiming under a settlement made by Mr. *Vaughan's* will; and there are many instances where, in case of voluntiers, contingent remainders have been destroyed, they being favoured neither in law or equity. *Pollexfen* 250. where tenant for life, with remainder to himself, destroys the contingent remainder, it has always been held good: and it is here admitted, that had there been a purchaser there would have been no relief, which appears by this very decree; for, it gives no relief against such who have purchased part of this estate *bona fide*. As this case is circumstanced there can be no reason for a court of equity to interpose; for, they seek relief as to one part of the father's will, which they do not like; but would have the other part, which makes for them, to stand. 2 *Vern.* 582. *Noy versus Mordaunt*. Here is a very fair settlement made by the father, and it has gone farther towards serving Mr. *Vaughan's* intent, which was to have the estate remain in the family, than would have been otherwise if he had been tenant in tail: the defeating this will be disappointing the provision made by the father for his younger children, which, could the father have apprehended, he would have provided otherwise for his children. Their saying the conveyance to Sir *Edward Mansell* was only a trust for payment of debts (for, that it was not *Dorothy's* intent to disinherit the child she was then *ensient* of) is setting up an intent to defeat the express act of the parties, which was a conveyance for and in consideration of natural love only to Sir *Edward Mansell*, and to no other use or purpose whatsoever; and the word *trust* not so much as mentioned in any part of the deed; and there being in the end of the deed an express provision that all conveyances shall be to the use of Sir *Edward Mansell* in fee, and to no other use whatsoever. In the

case of *Lowther* versus *Lowther* there was an express conveyance to strangers in trust; none of which is in this case: but here the conveyance is to his own heirs, without mentioning a word of any trust. Neither will their other method of taking it as a breach of trust do much better; since remedy has been often denied (y) against the trustees for preserving contingent remainders in case of a tenant in tail. *Pratt* versus *Spring*, 2 *Vern.* 303. *Bowater* versus *Ely*, 344. *Ely* versus *Osborne*, (z) 754. Neither do they pray their remedy against the trustees, but against the remainder-men under the will. Tenant for life by fine bars the contingent remainders, there can be no remedy against him: and yet that is a stronger case than this; since there he had a kind of trust reposed in him, but here he has none at all. Then were cited the cases of *Stapleton* versus *Sherrard*, 1 *Vern.* 212. *Sherbourne* versus *Clarke*, 273. *Smith* versus *Dean and Chapter of St. Paul's* and *Rogle*, 367. and in *Show. Parl. Cas.* 67. to prove that equity would not assist to defeat those advantages a man has at law, by taking fetters off another

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(y) As where upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage, for next after the parties to the marriage, the Court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement: as also where the application to the Court for relief, has been made by one who has not at the time, nor possibly ever might be entitled to the remainder, under the words of the limitation. *Vide Sir Thomas Tippen's case*, 1 *P. Will.* 359 (cited). *Else v. Osborn*, *ibid.* 387. *Fearne's Cont. Rem.* 482. 4 *ed.* But where a trustee joins with the *cestui que trust* in tail, in any conveyance to bar the intail, it is no breach of trust, for it is no more than what he may be compelled to do. *Robinson v. Comyns*, *ante* 166. *Allington v. Boteler*, 1 *Bro. Cha. Rep.* 72.

(z) 1 *P. Will.* 387. S. C.

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man's estate. Upon the whole, as no precedent had been shewn where in the like case any remedy had been given, and that the case of *Pye* versus *George* was but an extrajudicial opinion of the Court, and so imperfectly reported that no stress can be laid on it, they said it would be hard to begin in this case; which must be by taking away a legal title, and defeating the provisions made for younger children, who are always favoured in equity. Besides, we should be left without any provision for the debts which had been paid by old Sir *Edward Mansell*, and to which this estate was liable: and therefore prayed the decree might be reversed.

No judgment was now given. But in *Michaelmas* vacation, 6 G. 2. the opinion of the Court was delivered at my *Lord Chancellor's* house.

Lord Chancellor *King*,
 Lord Chief Justice *Raymond*,
 Lord Chief Baron *Reynolds*;

Reynolds Chief Baron, after having stated the case,

There are two points;

First, Those conveyances being made with an intent to raise money to pay the debts of *Edward Vaughan*, whether this provision ought to extend to that purpose only? for, then there will be a resulting trust to the old uses under the will of *Edward Vaughan*.

(258) *Secondly*, Supposing the contingent estate destroyed, whether this is such a breach of trust as that the estates defeated thereby ought to be set up again in this Court against those who claim under a voluntary conveyance with notice?

1st, In the first place it is evident that the trustees not having executed the deed of feoffment, but being made parties without their consent, their estate could not be affected or destroyed thereby; and the same may be said of the fine; and if nothing else had been done, the contingent remainder had been good: but the deeds of lease and release executed by the trustees, were an absolute conveyance, and have no reference to what was done before, but were made on purpose to destroy their own estate, and consequently the contingent remainders. I admit all the cases of resulting trusts, 2 *Vern.* 645. *Harcourt and Weymouth*, *Loder and Loder*, and which are all founded upon this plain principle, that when an estate is conveyed for particular purposes, so soon as they are satisfied there is a resulting interest to him who ought to have the estate; but there is no trust exprest in the deeds of lease and release; nor can it be pretended they ought to be coupled with the deed of feoffment before executed by different parties, and for different purposes; the one being to pay debts, and the other to destroy contingent remainders.

2^{dly}, Whether equity ought to interpose, so as to set up these estates against the trustees, and those claiming under them.

That this is a breach of trust is so plain, that I know not how, by any thing I have to say, to make it more so. Indeed had this conveyance been for a valuable consideration without notice, the purchaser could not have been affected; but when any one claims by a voluntary conveyance with notice, he must take the conveyance cloathed with all its trusts. *The dictum of a counsel at the bar in the Duke of Norfolk's case* is of very little weight; besides it does not appear there to be his own opinion. And *Salk.* 680. is to the contrary. The case of *Englefield and Englefield*, 1 *Vern.* 413. was solely decreed on the point of fraud; for, there were no

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trustees to preserve contingent remainders. As to the case of *Elfe and Osborne*, 2 Vern. 754. that determination can be of no greater authority than the reason on which it is founded will warrant; there the Lord Chancellor took it, that the son had an estate tail, and therefore the remainder ought to be considered no longer as contingent, and that then the trustees became trustees for the tenant in tail, to which estate the quality of barring remainders over is essential; but this is not the present case: for, here the trust subsisted in its full force. *Winnington (a) versus Foley, Tipping versus Pigot*, reported in *Abr. Eq. Cases* 385. in all these cases the remainder-man was *in esse*; so that he had an estate tail vested, and then the trustees became trustees for tenant in tail, and consequently the estates over might be barred. It is said, that courts of equity (b) have obliged trustees to join; but this has been just as the circumstances of the cases have appeared, 2 Vern. 303. And whatever they have done, or may

(a) 1 P. Will. 536. S. C.

(b) But this (in the words of Mr. *Fearne*) has only happened under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement, or in favour of creditors where the settlement was voluntary; or for the advantage of the persons who were the first objects of the settlement; as to enable the first son, &c. to make a settlement upon an advantageous marriage. *Vide Fearne's Cont. Rem.* 4 ed. 483. *Platt v. Sprigg*, 2 Vern. 303. *Frewin v. Charleton*, 1 Eq. Abr. 386. pl. 4. *Basset v. Clapham*, 1 P. Will. 358. *Winnington v. Foley*, 1 P. Will. 536. And however (continues the same learned author) the Court may see proper to direct trustees to concur in destroying contingent remainders, under circumstances like those in the above noticed cases; it has repeatedly denied the same interposition, in cases where such ingredients were wanting, as in *Davies v. Weld*, 1 Vern. 181. 1 Eq. Cas. Abr. 386. *Townsend v. Lawton*, 2 P. Will. 379. *Symance v. Tattam*, 1 Atk. 613. *Woodhouse v. Hoskins*, 3 Atk. 22. *Barnard v. Large*, Cox's note, 2 P. Will. 684. 1 Bro. Cha. Rep. 534. S. C. *Ambl. Rep.* 774, S. C.

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do, yet they will never have it left to the discretion of a trustee to do it. It is objected that the plaintiff has a satisfaction by the will, and therefore he ought not to have the advantage of both. 2 *Vern.* 581. I answer, that what he has under the will is not a proper equivalent, since he is thereby only made tenant for life, without power to provide for younger children, or pay his debts; besides, the estate is only limited to his first son in tail: and farther, there is no condition annexed to the devise, either exprest or implied; but the present question is only concerning the *Vaughan's* estate, the *Manfell's* is sufficient to pay the farther debts and legacies. As to the inconveniencies they are imaginary, and there is no comparison between them and those which would attend the other side of the question; for, if this should stand, the trustees might, without reason, and without the direction of a court of equity, join to defeat most settlements: therefore the plaintiff ought to be relieved, but in what manner must be left to my *Lord Chancellor*.

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Lord Chief Justice *Raymond* agreed with the Chief *Baron* in both points, and spoke to this effect: as to the contingent remainders, since they are destroyed, the plaintiff is intitled to relief, either against the trustees or the purchasers with notice. That such remainders may be destroyed is a positive law, and when done, there is no remedy at law; and therefore persons were chosen in whom there was a confidence placed to preserve men's estates in their families. It has been said, that remedy may be had at law for a breach of trust: but I think it is the proper business of a court of equity to keep trustees within due bounds, and to give relief. If there is tenant for life, with contingent remainders, and he defeats them, he is not answerable for it, since no trust or confidence was reposed in him: and in such case *æquitas sequitur legem*. As to cases in point, though there are none, yet the reason of the thing will govern it. If an estate subject to a

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trust is purchased from the trustees for a valuable consideration, *without notice, a court of equity cannot affect the purchaser*, but they can the trustees; but if such purchaser had notice, then the trust goes along with the estate, and the land still continues subject to it. It may be trustees have been excused where there have been favourable circumstances: but here is not the least reasonable matter to induce the trustees to join; therefore what they have done is against natural equity and justice. In the case of *Else and Osborne*, 2 Vern. 754. The inheritance was vested; and what was done might be proper for the circumstances of the family; but *non sequitur* a trustee may do it in what cases he shall think proper. Upon the whole he was clear that the plaintiff should be relieved.

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Lord Chancellor said he would confine himself to one point, whether in this case the breach of trust ought to be relieved against? For, as to the resulting trust, and the equivalent satisfaction, he thought there was not much in them, and would give no opinion about them. In point of law these remainders are absolutely destroyed. Though the trustees had defeated their estates, yet if the wife had kept hers, that would have preserved the contingent estates over. The question now is, whether equity will relieve? Here is no fraud but what appears on the deeds. It would be a very odd thing to say, it is not a breach of trust for those persons who are appointed to preserve estates, to defeat them contrary to the intent of him who reposes a confidence in them. Then if this is a breach of trust, equity may relieve; for, this is a matter within its original jurisdiction. He said, he never knew that law had any thing to do in the case: if then it be the business of equity to keep trustees within compass, and to see trusts executed, can equity sit still and see trustees break their trusts? At law, if there had been a trustee to an use, and he had conveyed without consideration and without notice of the

the use; or though it had been for a valuable consideration, yet if there had been notice, the use would have followed the land: and trusts are to be governed by the same rules that uses were before the statute of uses. If there had been a bare tenant for life, who is no trustee, equity would not have relieved; for, there can be no breach of trust where (c) there is no trustee: and such case is like a collateral warranty by tenant for life, against which equity would never relieve. (d) Indeed courts of equity have gone great lengths to judge whether a man would have any child or not; but I shall be very cautious how I do it. A breach of trust will go so far as to affect the trustees, and all who purchase under them having notice. However, here is no occasion to go against the trustees, since the lands themselves may be had; and this being the case of a purchaser with notice, (e) my *Lord Chancellor* confirmed the decree made by the *Master of the Rolls* in favour of the plaintiff. (f) (262)

(c) *Vide Fearne's Cont. Rem.* 487, 4 ed.

(d) *Vide ante* 237.

(e) *Vide Garth v. Cotton*, 3 *Atk.* 751, 1 *Ves.* 524. S. C. *Durnford v. Lane*, 1 *Bro. Cha. Rep.* 109.

(f) *Reg. Lib. B.* 1732. fol. 76.

DE
Termino Paschæ

6 Geo. II.

IN CURIA CANCELLARIÆ.

Case 57.

25, 26 April
1733.

Cited *ante*
25, 26.

Lady Lanesborough versus Fox.

A. having the reversion in fee of lands settled upon the marriage of B. his son, in the usual manner, devises all the lands in that settlement on failure of issue of the body of B. and for want of heirs male of his own body to, his daughter F. and the heirs of her body. This will does not give an estate tail by implication to B. The devise to F. is executory ; and is void, as being on too remote a contingency.

*MARK Anthony Morgan, Esq; lessee of George Fox, Esq; brought an ejectment in the court of Exchequer in Ireland against the Lady Dowager Lanesborough, for several castles and lands in the county of Longford in Ireland: to which the Lady Lanesborough pleaded not guilty. The cause came to be tried by a special jury at the bar of the said Court, who found a special verdict in Michaelmas term, 1727. viz. That Sir George Lane, Knt. and Bart. afterwards Lord Viscount Lanesborough, was seised in fee of the said castles and lands, and being so seised did, in consideration of a marriage then to be had between his son James and Mary Compton, now the said Lady Lanesborough, and of 2000*l.* marriage portion, by indentures of lease and release, dated the 3d and 4th of May, 1676. convey the said castles and lands to Thomas Earl of Ossory, Richard Earl of Arran, Henry Lord Bishop of London,*

and

and Sir *Hugh Cholmondeley*, Bart. and their heirs, upon the trusts and to the uses following, viz. That the said *James Lane* should have thereout, during the joint lives of him and Sir *George Lane*, one annuity of 300*l.* and in case the said intended marriage should take effect, then after the death of the said *James Lane*, that the said *Mary Compton* should have and receive one annuity or yearly rent of 320*l.* for her jointure; and subject thereto to the use of the said Sir *George Lane*, for his life, without impeachment of waste, and then to the use of the said *James Lane* for ninety-nine years, to commence from the decease of his father Sir *George Lane*, if the said *James Lane* should so long live, without impeachment of waste; and then to the use of the said Earl of *Ossory*, Earl of *Arran*, Bishop of *London*, and Sir *Hugh Cholmondeley*, and their heirs, during the life of the said *James Lane*, upon trust to support the contingent remainders, and then to the first son of the body of the said *James Lane* on the body of the said *Mary Compton* to be begotten, and the heirs male of the body of such first son, with like remainders to all other the sons of the said marriage successively in tail male; and for default of such issue, then to the use of the heirs male of the body of the said *James Lane*; and then to the right heirs of the said Sir *George Lane*.

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That the said marriage was had and solemnized, May 5, 1676. and the said 2000*l.* paid to the said Sir *George Lane*.

That Sir *George Lane*, then Viscount *Lanesborough*, being seised in fee of the reversion of the said premisses, did, the 10th day of *July*, 1683, make his last will and testament in writing, and did thereby, among other things, devise in the words following: “ *Item*, I will and devise the manor and town of “ *Lanesborough*, and all other the lands, tenements “ and hereditaments, mentioned or contained in the “ settlement made by me on the marriage of my

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“ said son *James Lane* with the daughter of Sir
 “ *Charles Compton*, second brother to the late Earl
 “ of *Northampton*, on failure of issue of the body of the
 “ said *James Lane*, and for want of the heirs male of
 “ my body, to my said daughter *Frances Lane*, and
 “ the heirs of her body lawfully to be begotten;
 “ and for want of such issue, to my said daughters
 “ the Lady *Beaufoy* and *Mary Bingham* severally,
 “ and the heirs of their bodies lawfully begotten or
 “ to be begotten, severally and respectively; and
 “ for want of such issue, that ail and every of the
 “ premisses shall be and remain to his Grace *James*
 “ Duke of *Ormond*, and the heirs male of his body
 “ lawfully begotten or to be begotten.” And in a
 subsequent part of his said will, he did will and de-
 vise, that if his said son *James Lane* should die with-
 out issue male, his the said testator’s wife surviving
 him, his said wife should hold and enjoy his house
 and park in *Rathline*, and all the houses, lands, te-
 nements and hereditaments in the county of *Long-*
ford, wherein he had any estate of inheritance in
 possession, reversion or remainder, for and during
 her natural life; and after her decease, to the sever-
 al uses to which the same are limited as aforesaid;
 and made his said wife executrix of his said last will
 and testament.

That the said *George Lord Viscount Laneshorough*
 died the 1st of *December*, 1683. so as aforesaid
 seised of the same reversion of the manors, towns
 and lands in the declaration mentioned, and had
 issue at the time of his death the said *James*, his
 only son and heir, and two daughters, to wit, *Mary*
 and *Charlotte*, by his first wife, and the said *Frances*
 by his second wife, and no other issue male; and
 that *Thomas Earl of Ossory* died the 2d of *June*,
 1681. and that *Frances Viscountess Laneshorough*,
 the widow of *George Lord Laneshorough*, died the 1st
 of *May* 1700. in the life-time of the said *James*
Viscount Laneshorough.

That

That *James* then Viscount *Lanesborough*, December 1, 1683. after the death of his father, entred upon the premiffes, and was thereof poffeffed, and the faid furviving trustees became feised of the faid manors, towns and lands in the declaration mentioned, by virtue of the faid deeds of leafe and release, bearing date refpectively the 3d and 4th of *May*, 1673. in fuch manner as the law allows.

That the faid *James* Viscount *Lanesborough*, and the faid Earl of *Arran*, Lord Bifhop of *London*, and Sir *Hugh Cholmondeley*, the then furviving trustees, by indentures of leafe and release, the 16th and 17th of *October*, 1684. for the barring all eftates tail, re-versions and remainders, and to the end to fettle and affure the fame as therein after mentioned, did convey to *Edward Brabazon*, Efq; and *William Smyth*, Gent. and their heirs, amongst others, the manors, caftles and lands in queftion, to the intent and purpofe, that one or more common recovery or recoveries might be thereof had and fuffered; which faid recovery or recoveries fhould be and enure to the ufe of the faid *James* Viscount *Lanesborough* for his life, without impeachment of wafte; and after his deceafe, then to the ufe of the Lady *Mary* Vifcountefs *Lanesborough*, wife of the faid *James* Viscount *Lanesborough*, for her life, as and for an increafe of or augmentation of her jointure, and in bar of her dower and thirds at common law; and after her deceafe, then to the ufe of the faid *James* Vifcount *Lanesborough* and his heirs.

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That the faid recovery was accordingly fuffered, *Hill. 36 Car. 2. 1686.* of the faid manors, towns and lands in queftion, in which *Fergus Farrell*, Efq; and *Edward Nangle*, Gent. were demandants, and the faid *Brabazon* and *Smyth* were tenants, who vouched the faid *James* Viscount *Lanesborough*, who vouched the common vouchee.

That the faid *James* Viscount *Lanesborough* being fo poffeffed of the manors, towns and lands in queftion,

tion, *October* 15, 1722. did make his last will and testament, and did thereby devise to *George Hooper*, Lord Bishop of *Bath and Wells*, and *Hatton Compton*, Lieutenant General, and *Robert Dormer*, Esq; a judge of the *Common Pleas*, and *James Middleton*, Esq; and their heirs, all his manors, lands, tenements and hereditaments whatsoever in the kingdom of *Ireland*, in which he, or any person in trust for him, had any estate of inheritance or other interest in possession, reversion, remainder or expectancy, in trust nevertheless, and to and for the several uses therein after expressed: that is to say, that from and after his decease, his said trustees should stand and be seised of all the said premises in the said county of *Longford*, in trust for the heirs of his body: and for want of such issue he did will and devise that the said trustees should permit and suffer his sister *Charlotte Lady Beaufoy*, for and during her life, to have and receive for her own use and behoof, the rents, issues and profits of the farm and land of (266) *Coolcroy Barony of Rathline* in the said county of *Longford*; and after her decease, his said trustees should permit and suffer his said wife to have and receive to her own use the rents, issues and profits of the said premises last mentioned. And his will was, that his said trustees should suffer his said wife, from and immediately after his decease, to have and receive to her own use, all the rents, issues and profits of all the rest and residue of his said manors, lands and real estate in the kingdom of *Ireland*, for her life; and after her decease, directed his trustees should convey the said premises to the several uses in the said will mentioned, viz. To the use of *John Bell Lane*, the eldest and only grandson of his sister *Mary Bingham*, afterwards called *Mary Middleton*, deceased, for his life; and after his decease, to the use of his first and other sons in tail male, with several remainders over: and he did appoint his said wife sole executrix of his said will.

That

That the said *James Viscount Laneborough*, *August* 30, 1724. died possessed of the said manors, towns and lands in question, and without issue.

That the said *Frances Lane*, daughter of the said *George Lord Viscount Laneborough*, and devisee in his said last will, married *Henry Fox*, and by him had issue *George Fox* the lessor of the plaintiff, her eldest son and heir; and the said *Henry* died the 13th day of *October*, 1718. and the said *Frances* died the 12th day of *December*, 1712. leaving the said *George*, the lessor of the plaintiff, her eldest son and heir of her body, who, on the 1st of *September*, 1724. entered upon the said premisses, and was thereof seised as the law directs, and made the lease to the said *Mark Anthony Morgan*, as in the declaration above-mentioned, who entred upon the premisses, and was possessed thereof until the said *Mary Viscountess Laneborough* entred upon the premisses and ejected him.

But whether upon the whole matter found by the said jury, the said Lady Viscountess *Laneborough* be guilty of the said trespass or not, the jury are altogether ignorant: and if the Court judge her guilty, then they find her guilty, and assess damages and costs; but if the Court do not think her guilty, then they say she is not guilty.

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The jury find the several settlements, recovery and wills herein before-mentioned *in hæc verba*:

Hill. 1730. The Court of *Exchequer* in *Ireland* gave judgment for Mr. *Morgan* the lessee of *George Fox*, Esq; and 68*l*. 18*s*. for damages and costs.

The same term the said Lady Viscountess Dowager *Laneborough* brought her writ of error in the *Exchequer* chamber in *Ireland*, returnable in *Easter* term, 1731. Upon which writ of error the said judgment was affirmed in *Easter* term, 1732. Upon which

which affirmance of the said judgment the said Lady Viscountess Dowager *Lanesborough* brought a writ of error before the *House of Lords* of Great Britain; which coming on to be heard on the 25th and 26th of *April*, 1733. and Mr. *Talbot*, Solicitor General, and Mr. *Ryder*, having argued for the plaintiff in error; and Sir *Philip Yorke*, Attorney General, and Mr. *Lutwyche* for the defendant in error; the judges having been ordered to attend, were asked their opinion, whether Lord *James* took any other or greater estate by the will than by the settlement? and it being agreed they should deliver their opinions *seriatim*,

Mr. Justice *Reeve* delivered his opinion with his reasons, that the Lord *James* could not take an estate tail, no alteration being made by the will, and that no estate is raised to Lord *James* by implication. Then

Mr. Justice *Lee*, Sir *William Thompson*, Mr. Justice *Fortescue*, Mr. Baron *Comyns*, Mr. Justice *Probyn*, Mr. Justice *Page*, and the Lord Chief Baron, severally delivered their reasons, and all were of the same opinion.

(268) After which this question was put to the judges, *viz.* whether any or what estate *Frances* took by the will of Lord *George*? And thereupon Mr. Justice *Reeve* delivered his opinion, with his reasons for it, that *Frances* took no estate whatsoever; but that the devise to her was absolutely void in its creation, as being in too remote a contingency. Also all the other judges declared themselves of the same opinion, and severally delivered their reasons.

The judgment of the *Exchequer Chamber* in *Ireland*, affirming the judgment of the Court of *Exchequer* there, was reversed. (g)

(g) 4 *Bro. Cha. Rep.* 96. S. C. The principle which governed the opinion of the judges upon the questions put

to them in this case seems to have been, that the limitation to the daughter *Frances Lane* was future, being to arise after the failure of issue of the body of *James Lane*, and of the heirs male of the body of the father, *Sir George Lane*: now, there was no subsisting estate extending to the issue of the body of *James Lane* (generally) the settlement being confined to his first and other sons, and their issue male; nor indeed was there any estate tail in *Sir George Lane* himself, to extend to the heirs male of his own body, and therefore the estate devised by *Sir George Lane*, could not be considered as the devise of a reversion depending or expectant on such preceding estates. And though as *Sir George Lane* had but one son, and there was a limitation by the settlement to the first and other sons of such son in tail male, the devise for want of heirs male of his (*Sir George's*) own body, might have been construed as a devise of the reversion expectant on the failure of sons of his said son, and the heirs male of their bodies; yet as there was no pre-existing estate extending to issue female of the body of *James Lane*, it was impossible to consider the devise on failure of issue (generally) of the body of *James* as the devise of a reversion expectant on failure of such issue, there being no preceding estate extending to that period, consequently, unless such a preceding estate was raised by implication (which was not admitted by the judges) the devise to the daughter *Frances Lane* was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote. The decision in *Lady Laneborough v. Fox*, was afterwards very amply discussed in the case of *Morgan v. Jones*, B. R. Hil. 1773. and by the whole Court allowed to be law. *Vide Fearne's Conting. Rem.* 3ed. 329. 7 Bro. Parl. Cas. 130. S. C. where the above case of *Morgan v. Jones* is fully stated. *Moore v. Lord Parker*, Lord Raym. 37. 4 Mod. 316. S. C. *Badger v. Lloyd*, 1 Salk. 232. 1 Lord Raym. 523. *Goodman v. Goodright*, 2 Burr. 873.

D E

Term. S. Michaelis

4 Geo. II.

IN CURIA CANCELLARIÆ.

Case 58.

Rogers versus Rogers. (b)

A. among other legacies, gives a legacy of 5 *l.* to *B.* his brother and heir, and then makes his beloved wife *C.* his sole heiress and executrix of all his

lands, tenements, goods and chattels, the same to sell and dispose of as she should think proper, to pay his debts and legacies. This is a gift to her of the surplus in fee; and there is no resulting trust for the heir.

WILLIAM Rogers made his will, and gave a legacy of 5 *l.* to *H. Rogers* his brother, and heir at law, amongst several other legacies; and then he constituted his beloved wife *Mary Rogers* his whole and sole heiress and executrix of all his lands, tenements, goods and chattels whatsoever, real and personal, the same to sell or dispose as she should think proper, to pay his debts and legacies of that his last will and testament. (*i*)

The question was, whether there be a resulting trust, &c. for the plaintiff the heir at law?

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It was said for the plaintiff, that in cases parallel to this, the determinations had been that there should be a resulting trust. The rule of law in devises of legal estates is, that the heir at law shall not be disinherited without express words; and equity has followed the same rule with respect to trusts; in

(*b*) 3 *P. Will.* 193, S. C.

(*i*) *Reg. Lib. B.* 1732, fol. 330.

the present case it is not said what is to be done with the estate after the particular purposes are satisfied. 2 *Chan. Ca.* 115, 221. (k) 2 *Vern.* 424. *Randall versus Bookey*, there was a legacy given to the heir at law, as in the present case, from whence it might be collected that it was not intended he should have any thing else; yet it was held, that no more of the land should be sold than was necessary, and that the residue should go to the heir. 2 *Vern.* 644. *Hobart versus The Countess of Suffolk*, 2 *Vern.* 645. *Bristol versus Hungerford*; (l) these cases go farther than any other in favour of the heir, and even than the present case; for there the surplus was given to the executrix expressly; yet it was decreed to the heir at law. *Loader (m) versus Loader*, there land was devised to one for life, with remainders to his first and every other son in tail, and so on to a second person in like manner; and for default of such issue the remainder in fee was devised to the testator's kinsman *Robert* (for so it is expressed) and his heirs paying 5000*l.* to particular persons who were heirs at law of the testator; yet it was held there should be a resulting trust for the benefit of those heirs at law. *Heron versus Elford*, *Pasch.* 6 *Geo.* 2. 2 *Vern.* 571. 6 *Co.* 16. On the other hand it was argued for the defendant, it cannot be controverted but that the legal estate passes by this will; for, the very making one his heir is a devise of the fee to that person, as being put in the place of the heir at law: but though the legal estate does pass in point of law, yet when that has been done for a particular purpose, and that purpose is satisfied, it has been construed to be a resulting trust to the heir. (n) Therefore the present point under consideration is what the testator intended; for, making a con-

(k) *Culpepper v. Aston et e contra.*

(l) 2 *Vern.* 245. which case in 3 *P. Will.* 194, note (c), is said to be in *Vernon erroneously*, but in *Prec. in Chanc.* 82. accurately reported.

(m) *Mosely*, 356.

(n) *Ante* 254.

struction

(270)

struction contrary to that would be making a new will instead of expounding one. And a difference was taken between a will and a deed, the former importing a bounty, which the latter does not. 2 Chan. Ca. 115, 228. was of a deed; and it appeared more strongly to be a trust than in the present case: besides in that case there was no colour for supposing a bounty; but here the testator has called the devisee his well beloved wife; which imports a kindness for her. 6 Co. 16. is not applicable to this matter; for, there a difference was taken between a sum in gross and one issuing out of the rents and profits, and this in order to determine what quantity of the estate the devisee was to have, and not whether a trustee or not. In this case the testator has given the heir at law a legacy of 5*l*. But suppose it had been only a gift of a shilling, every body knows that would have implied a strong intention that he should have nothing else. If this be construed to be a resulting trust, there must be a different meaning put upon the same clause as to the personal estate and the land; for, as to the surplus of the former, it must be for her own benefit, when as to the latter she must be a trustee for the benefit of the heir at law; and that too when the testator has constituted his wife by his will to be his heiress. 2 Vern. 425. (o) was a devise upon trust; and as the testator had called the devisee a trustee, the Court would not determine him to be otherwise. The same answer may be given to 2 Vern. 644. (p) But 2 Vern. 646. (q) Mr. Attorney General said, was a case too strong to prove any thing; for, there money was decreed against the executor, when the surplus was expressly given him. In *Loader versus Loader* there was an express trust; and in *Heron versus Elford* land was devised upon special trust

(o) *Randall v. Bookey.*(p) *Hobart v. the Countess of Suffolk.*(q) *Countess of Bristol v. Hungerford.*

and

and confidence to sell for payment of debts in case the personal estate should prove deficient, unless the devisees should think proper to raise the same by any other ways and means. The cases cited in favour of the defendant were *Chancery Cases* 196. *North (r) versus Crompton*, 2 *Vern.* 247. (s) *Abr. Eq. Ca.* 273.

Lord King, *Lord Chancellor*. I think here is no resulting trust for the benefit of the heir; though, perhaps, the cases on this head are not reconcilable to one another. The word *Heiress* on all sides is agreed to carry the fee; then what is there in the will to draw the estate out of her? It is true a limitation in a conveyance to a man and his heirs, without declaring the use, will not pass the use for want of a consideration: but a devise implying a consideration in itself, there is no occasion to declare the use in order to convey the interest of the land; and if this were insufficient, yet being to a wife

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(r) *Katherine Crompton*, spinster, seized in fee of the lands in question, made her will in the following words: "I ordain and constitute *Henry North*, Esq; executor of this my last will, and I do give all my estate real and personal, to dispose of for the payment of all my just debts, and for the performing of all such legacies as I have herein, or by the codicil annexed, bequeathed unto my executor above-named;" and gives several legacies in money, and amongst others 200*l.* to the defendant her uncle who was her heir at law: the Lord Keeper assisted by four of the judges all agreed, that a fee passed by the devise: and as to the implied trust all conceived there was not any implied trust for the heir of the surplus, for if there were, the devisee had no benefit; and to no purpose was the devise of the 200*l.* to the heir if she had intended the surplus to the heir.

(s) *Cunningham v. Mellish*, which was a devise of lands to A. and his heirs and assigns for ever, in trust, to be sold for payment of all his debts and legacies and makes A. executor. The surplus after debts and legacies was held to be no resulting trust for the heir, as it would have been on a like case, on a conveyance executed.

whom

whom the husband mentions with affection, it is impossible to imagine he intended to give the land away from her, and make her a trustee for his heir: and though it is said that this is only a power to *sell or dispose of the real and personal estate*, yet it is *as she thinks proper*, either the one or the other at her election. Suppose the devise had been to a man and his heirs, to pay debts, the land would be affers at law; and there is no more in this case; only the testator hath in this case, by making her heiress, placed the devisee in the room of the heir, and made her absolute owner of the whole. Besides, the personal and real estate being mixed together, if there could be a resulting trust of the one, there must be the same of the other; which was never pretended where the executor had no legacy, or was not cut off by some express words. And (he said), 2 Vern. 247. and 1 Chan. Ca. 196, 7. were full in point, and decreed for the defendant.

D E

Termino Paschæ

6 Geo. II.

IN CURIA CANCELLARIÆ.

Carter versus Carter.

Case 59.

A. Devised 8000*l.* to be laid out in land, and settled to the use of *B.* in tail, remainder to *C.* in fee; *B.* and *C.* agreed by articles of writing to divide the money in the manner therein mentioned; *B.* the tenant in tail, died without issue soon after the making of the articles, and before they were executed by a division of the money. This came before the Court by way of appeal from the *Rolls*, where a specific performance of the articles was decreed in favour of the executor or administrator of *B.*

Money devised to be laid out in land to the use of *B.* in tail, remainder to the use of *C.* in fee; *B.* (having no issue) agrees with *C.* by deed to divide the money, and before this agreement is executed *B.* dies: this agreement shall bind, in favour of his executors.

Note; Some years before the articles were made, there was a decree obtained to have the money laid out in land, and settled according to the will; but the matter rested there.

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Lutwyche, In support of the decree, said, that at the time of the agreement it was very beneficial to the person who had the remainder, because the tenant in tail might have barred the remainder, had the money been laid out in land, and settled as the will

A-a

will directed. It is a rule, if money is to be laid out in land and settled to one in tail, the remainder to another in fee, that he in remainder shall not be barred of his contingency by the payment of the money to tenant in tail; but in the present case he in remainder is consenting to the division. *Legat versus Sewell*, 2 Vern. 551. It has been held since in the case of *Colwell* (t) and *Shadwell*, that if money is to be laid out in land and settled on one in tail, with remainder to the same person in fee, it shall be paid over to the (u) tenant in tail; because immediately after the money is laid out in land and settled, he may bar his issue.

A fine may be taken and compleated so far, even in vacation time, as to bar the issue in tail; but a recovery to bar an estate tail, or remainder dependant on such estate, cannot be suffered but in term time; which is given as a reason why money may be paid to tenant in tail, with remainder in fee to himself, but not when the remainder is limited over to another.

Mr. Attorney General *contra*: there is no reason to make a distinction between the issue in tail and a remainder; for, the one is as much in the view and contemplation of him who made the settlement as the other; and the *major* and *minus* of the time necessary to compleat a fine and recovery will not alter the case.

(273) Mr. Ryder on the same side, insisted, equity will not decree money to tenant in tail, though he has a

(t) See this case stated in *Chaplin v. Horner*, 1 P. Will. 484.

(u) So *Benson v. Benson*, 1 P. Will. 130. *Seely v. Jago*, *ibid.* 389. *Short v. Wood*, *ibid.* 471. *Edwards v. Countess of Warwick*, 2 P. Will. 173. *Trafford v. Boehm*, 3 Atk. 447. *Cunningham v. Moody*, 1 Vesf. 176. *Braaish v. Gee*, *Ambl. Rep.* 129. *Udham v. Hughes*, 2 Atk. 453.

• remainder

remainder in fee to himself. (x) And afterwards cited *Weldon versus Oxendon*, July 1731. at the *Rolls*. A man by will left 3000 l. to his wife, to be paid within six months after his decease, provided she would release all her right to dower of his real estate: she died before the end of the six months and before any release had been offered to her; yet it was decreed, that she not having performed the condition, no one would be intitled to the legacy, and therefore the bill was dismissed. If a husband before marriage covenants to make his wife a jointure, and she, in consideration thereof, covenants to convey her land to the use of her husband and his heirs, and the wife dies before the jointure is made, a court of equity will not compel a specific performance of those articles.

Mr. *Solicitor General* in his reply admitted the case of *Weldon versus Oxendon*, because the widow had an election; which never being made, she could not be intitled to the legacy: but distinguished it from the present case, because here both parties are bound by the mutual agreement.

As to the case of a covenant by the wife before marriage, he said a court of equity would compel a specific performance, though she died before a jointure was made; and that it was so determined in the case of *Cotter (y) versus Laver & al'*.

Lord Chancellor. This is a mutual agreement between the parties to have the money divided be-

(x) So *Eyre's case*, 3 *P. Will.* 14. and Mr. *Onslow's* case mentioned in the note to *Eyre's case*: but the present practice it should seem is conformable to the opinions contained in *Benson v. Benson*, and the other cases cited in note (b), page 272.

(y) 2 *P. Will.* 623. S. C.

tween them; and there were no children of tenant in tail *in esse*. The tenant in tail died before any thing was done in pursuance of the articles; yet every thing may be done now as well as it might in his life-time. The decree was affirmed.

(274) *Note*; He seemed to lay a good deal of stress on tenant in tail's dying without issue.

D E

Term. S. Michaelis

7 Geo. II.

IN CURIA CANCELLARIÆ.

Bromball versus Wilbraham.

Case 60.

RALPH *Wilbraham*, being seised and possessed of a real and personal estate, disposed of the same by will in manner following: "I give all my personal estate whatsoever to my three loving sisters, equally to be divided among them; and I give my real estate to my four sons, chargeable with the payment of my just debts;" and after makes his three sisters his executrixes. The testator died indebted by simple contract, bond and mortgages. The *Master of the Rolls* decreed, that the personal estate should be first applied towards payment of all the debts, and that the real estate ought to come in only to supply the deficiency, in case there should be any. From this decree the executrixes appealed.

makes his sisters his executrixes. The personal estate shall be applied in exoneration of the real; especially as one of these funds must be exhausted.

Mr. *Solicitor General* for the appellants said, on the face of the will it appeared the testator intended his real estate should be first applied to the payment of his debts; and that though he could not with respect to creditors prevent them from taking advantage of the legal fund, yet since he had originally

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(275)

a power to direct out of which of his estates his debts should be paid, and he has provided another fund for that purpose, this Court will so marshal the assets, that his intent may take effect. And though in this case his sisters are made executrices, yet they do not take as such; for, the direction in the will is, that the personal estate shall be equally divided amongst them; which is in a manner different from what they could have taken in as executrices; for, that would have been jointly. It is the common doctrine of this Court, that the *Heres Facus* (z) shall have the same benefit of the personal estate in discharge of the real, as the *Heres Natus*; yet when the testator has subjected the gift to the payment of debts, then it ought *transire cum onere*.

Mr. *Peer Williams* and Mr. *Fenwick* on the same side, cited 2 *Vern.* 756. 718. 477. in the last of which cases the *Lord Keeper* says an express devise shall not be defeated by applying the personal estate to pay off a mortgage.

Mr. *Willes* for the sons. The testator was not obliged in law, equity or conscience to make such provision for his sisters, as he was for his children; and it is the constant practice to allow them the same favour as creditors. It is a rule, that where a person is made executor, and comes to the personal estate in that right, it remains liable to be applied for the payment of debts in exoneration of the real estate, though the latter is charged by the will. So it is where the personal estate is devised to one by name, who afterwards is made executor in the will. 2 *Vern.* 43. 302. These two cases do not go so far as the present case, because there was no charge on the land by the will, but by the mortgage only. But 2 *Vern.* 153. 568. are full as strong.

(z) *Gower v. Mead*, *Prec. in Chanc.* 2, 3.

He observed, that the word in the will was *chargeable*, which he said was not so strong as if the word *charged* had been made use of; for the former may refer to the failure of the personal estate. 2 *Vern.* 112. 2 *Vent.* 349. were cited by Mr. *Stracy* on the same side.

Lord Chancellor King. Here is no clause to charge the real estate at all events; the word is *chargeable*. The natural construction of a will, where the testator gives all his personal estate to one whom he makes his executor, is, that the personal estate must go to the creditors, and the gift must be intended after debts paid. The testator has made his real estate subject, in case the personal estate fail.

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The decree was affirmed. (a)

N. B. In this case the real and personal estates were much of the same value, and the debts must have exhausted the one or the other fund; so that had the judgment of the Court been otherwise, the man's children would have been left without any provision.

(a) *Vide ante* 53. 202. and references; also *Forrester v. Lord Leigh*, *Ambl. Rep.* 171.

DE
Termino Paschæ

8 Geo. II.

IN CURIA CANCELLARIÆ,

Case 61.

25 March
1735.

Lutwyche versus Lutwyche.

A descent of
lands in Bo-
rough English
to the young-
est son will
not prevent
his having a full distributive share of his father's personal estate.

THOMAS Lutwyche, Esq; died intestate, possessed of a personal estate, and seised of a copyhold in fee at *Turnham Green*, which was in the nature of *Borough English*.

This cause came on by way of amicable suit to determine this question, whether the youngest son should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children?

Mr. *Solicitor General* for the plaintiff, the youngest son. This question intirely depends upon the statute 22 & 23 Car. 2. cap. 10. sect. 5. of *distributing intestates estates*. The *Borough English* estate by law descends to the plaintiff, and there are no express words in the statute to take it from him, or to exclude him from his share of the personal estate.

Mr.

Mr. *Green*. The words of the statute are to exclude such child, who shall have any estate by the settlement of the intestate, and the plaintiff takes this *Borough English* estate as his heir at law by the custom, and not by any settlement.

Mr. *Attorney General* for the defendants the other children. The statute of distributions was penned by civilians, without assistance of the common lawyers. The primary and ultimate intention of that statute was to make all the children of the intestate equal; and if the plaintiff prevails, there will be an inequality.

A person may take by settlement and by descent also; as, where an estate by settlement is limited to the heir of the body of a tenant for life, such heir comes in both by descent and settlement. The exception in the statute is, of the heir at law only; the question then is, who is meant by heir at law? In common parlance, heir at law means nothing but eldest son. According to the common law the eldest son is the heir at law, and distinguished from the heir by custom. The statute means only the eldest son. *Co. Lit.* 376. Title *Warranty*. Heir in *Borough English* is not heir at common law. *Hob.* A man may be heir to the land, and not heir at law to the person. There is no pre-eminence but to the eldest son by any law divine or human; the act intended to put the heir in that sense. In the statute it is heir at law in the singular number. If any other but the eldest son had been intended to be excepted, it would have been heir or heirs at law. *Pratt versus Pratt*, May 11, 1732. Decreed at the *Rolls*, that the heir in *Borough English* should bring his estate into *Hotch Pot*.

Mr. *Brown*. Before the statute of distribution all lands, as well as goods, were (by the civil law) distri-

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distributable among the children equally; and the intent of that statute is the same, except with respect to the heir at law. The word *settlement* is of various significations. Money advanced to a stranger to make a settlement on a child is not an advancement within the words of the act; yet in equity it has always been held to be an advancement. The act is to be construed in an equitable sense, and not according to the letter of it; and equality among younger children is intended by it. Personal advancement to the heir at law is not within the statute; yet he must bring it into *Hotch Pot*. *Phiney* versus *Phiney*, 2 *Vern.* 638. The son and heir intitled to 500*l.* under a marriage agreement, decreed to bring it into *Hotch Pot*, upon the statute of distributions, though in nature of a purchaser. 2 *Vern.* 558. *Willcox* versus *Willcox*, the father covenanted to settle 100*l.* *per annum* on his son, but did not; yet having suffered 100*l.* *per annum* to descend upon him, that was decreed to be a good performance of the covenant, and the personal estate was ordered to be distributed among the other children according to the custom of the city of *London*. A person buying *Borough English* lands, knows the same will descend to his youngest son; which is the same thing as a settlement or provision for the youngest son. The act is only in favour of primogeniture. There are different *species* of heirs at law; the heir at law spoken of in the act by way of eminence, is the most worthy. The act comprehends only one heir, and that must be eldest, which is the most worthy. *Carter* versus *Crowley*, *Raym.* 553. All the representatives have the intestate for their correlative throughout the whole act. *Tayler* versus *Webb*, *Styles* 207. where the act speaks of the wife, it means the wife of the intestate; of a child, the child of the intestate; of the heir at law, the heir at law of the intestate; &c. Heir at law in *Borough English* is not heir at law to the intestate, but only to the land;

land; therefore such an heir at law cannot be meant by the act. Suppose the intestate had left only daughters; all the estate, both real and personal, would be equally divided amongst them. If the heir in *Borough English* is meant by the statute, he must be privileged throughout. The privilege is not annexed to the land, but to the person: and suppose the heir in *Borough English* had had a freehold estate of 1000*l. per annum* settled on him by the intestate in his life-time, it could not have been said he should bring the freehold estate in *Hotch Pot*, and not the *Borough English*; both or neither must be brought into *Hotch Pot*.

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Reply. The intent of the statute to make all the children equal does not appear. The question is, if there are any words in the statute to exclude the heir in *Borough English* from having his share in the intestate's personal estate? There are none. Before the statute the heir in *Borough English* must by the common law have had the estate: it follows then that he must have it still; for, the law is not altered.

Lord Chancellor. The question is, whether the first words in the statute (*the residue to be divided by equal portions amongst the children of the intestate*) are extensive enough to bring the *Borough English* estate into *Hotch Pot*? The second question is, whether by the second words (*other than such child (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time, by portion or portions equal to the share which shall by such distribution be allotted to the others to whom such distribution shall be made*) the plaintiff can be excluded. It is proper to take into consideration what the law was before the statute. All the children had a right to administration if there was no wife; and if administration was granted to one,
a pro-

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a prohibition went to compel the ordinary to distribute. The first clause specifies to what persons distribution shall be made, that is, amongst all the children equally, except those who had any estate by settlement, or should be advanced; and those which were advanced are totally excluded. The third clause is, if any child is advanced in part, such child is to have so much more as will make his share equal with the rest unadvanced: they are material words, *other than such child who shall have any estate by settlement from the intestate*. The question is, what is meant by the word *settlement*? There was no settlement made by the intestate in this case; it was only a common purchase made by him. The plaintiff took the estate by descent, and not by any settlement. The act of law throws the estate upon the youngest son; not the act of the father: he has permitted the land to descend to the youngest son, but he is not by the words of the act thereby excluded from his share of the personal estate. It is a *casus omisus*. I cannot supply any clause in an act of parliament, though I may explain doubtful words. The exception in the statute was intended for one person; I cannot say it was so intended throughout. The last clause is explanatory, and shews what was intended to be excepted, *only land which the heir at law would have by descent or otherwise*; not pecuniary advancement. In common parlance the heir at law is the eldest son, in relation to the intestate, and is only one person; and not the heir in *Borough English*: the exception extends only to the eldest son. But there is no law for the plaintiff to bring the *Borough English* estate into *Hotch Pot*, only this statute; and there are no words here that oblige him to it.

Decreed an account of the personal estate of the intestate, and that the plaintiff have an equal share, without regard to the value of the *Borough English* estate.

N. B.

N. B. The case of *Pratt (b)* and *Pratt* came after this case before the Lord Chancellor *Talbot*; and he reversed the decree of the *Master of the Rolls*, and decreed agreeably to this case. *Vide* Appendix to *Robinson of Gavelkind*.

(*b*) *Fitzgibbon Rep.* 284. S. C.

D E
Term. S. Hillarii

IO GEO. II.

IN CURIA CANCELLARIÆ.

Case 62.

Barbuit's Case in Chancery.

Of foreign ministers, consuls, &c. Whether privileged by the statute, which is declarative of the law of nations; there is no prescript form of appointing them. A foreign minister who uses merchandizing does not thereby lose his privilege; though any of his retinue in such case would. Matters of commerce may be proper objects for the imployment of ambassadors. Yet, *quere* Whether Consuls have such privilege?

BARBUIT had a commission, as agent of commerce from the King of *Prussia* in *Great Britain*, in the year 1717. which was accepted here by the *Lords Justices* when the King was abroad. After the late King's demise his commission was not renewed until 1735. and then it was, and allowed in a proper manner; but with a recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern, and not to the King: and his business described in the commissions was, to do and execute what his *Prussian Majesty* should think fit to order with regard to his subjects trading in *Great Britain*; to present letters, memorials and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby his *Prussian Majesty* required all persons to receive writings from his hands, and give him aid and assistance. *Barbuit* lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or former

reign

reign minister, to be free from arrests. (c) After hearing counsel on this point,

Lord Chancellor. A bill was filed in this Court against the defendant in 1725. upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were over-ruled; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for, the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. Then the question is, whether the defendant is such a person as 7 *Anne*, cap. 10. describes, which is only declaratory of the antient universal (d) *jus gentium*: the words of the statute

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(c) *Vide Triquet and others v. Bath*, 3 *Burr.* 1480. S. P. 1 *Black. Rep.* 471. S. C.

(d) *Vide* 1 *Black. Com.* 255. where the circumstance which occasioned the making this act is stated at large.

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are, (*ambassadors or other public ministers*) and the exception of persons *trading* relates only to *their servants*; the parliament never imagining that the ministers themselves would trade. I do not think the words *ambassadors*, or *other public ministers*, are synonymous. I think that the word *ambassadors* in the act of parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called *ambassadors extraordinary*; and *public ministers* in the act take in all others who constantly reside here; and both are intitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong: but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorised as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to intitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact

act affairs between the two crowns: the commission is, to assist his *Prussian Majesty's* subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

It is the opinion of *Barbeyrac*, *Wincquefort* and others, that a consul is not intitled to the *Jus Gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are intitled to the *Jus Gentium*, I cannot discharge him. (e)

Note;

(e) In the discussion of this case the Court seems to have determined, that a person residing in this country in the capacity of foreign minister, cannot by any act or acts of his own, waive that privilege of protection which *the law of nations* has annexed to a situation so important.—That a foreign minister, being or becoming a trader, does not thereby lose, or forfeit the privilege personally annexed to him; and therefore, the only reason why the Court in the present instance did not think the defendant entitled to the protection which he claimed, was, that the employment which he was invested with, could at most be considered only as the same with, or equal to that of consul, which, according to the best writers upon the subject, was not entitled to the *Jus Gentium*, or privilege belonging to ambassadors or ministers who

Note; The person was after discharged by the *Secretary's office*, fatisfying the creditors.

who are entrusted to transact matters of state or other affairs between *two nations*.—That the law of nations (which in its fullest extent was and formed part of the law of *England*) was the rule of decifion in cafes of this kind; and that the act of parliament was declaratory of it, and occasioned by a particular incident.

DE
Term. S. Trinitatis

7 Geo. II.

IN CURIA CANCELLARIÆ.

Tanner versus Morfe. (f)

Cafe 63.
1734.

THOMAS Carter, March 10, 1725. made his will, whereby he devised in the following manner: "As to my temporal estate, I bequeath to my nephew *Tanner* (the testator's heir at law) the sum "of 50*l.*" Then he gives several legacies: "And "all the rest and residue of my estate, goods and "chattels whatsoever, I give and bequeath to my "beloved wife *Mary Carter*; whom I make my full "and sole executrix."

A devise in the following words: *as to my temporal estate, I bequeath to my nephew T. (the testator's heir at law) 50*l.* Then after several legacies, and*

all the rest and residue of my estate, goods and chattels whatsoever, I give and bequeath to my beloved wife M. C. whom I make my full and sole executrix. This is a devise of the fee simple estate of the testator.

The heir at law brought this bill against the devisee and executrix, who married the defendant *Morfe*, to have an account of what deeds, belonging to the testator, she had got in her custody; and to set forth what right she claimed to the real estate of *Thomas Carter*, and whether he made any will;

(f) 3 *P. Will.* 295. S. C. but reported by the name of *Tanner v. Wife*, *Trin.* 1734. on a rehearing (before Lord *Talbot*) from a decree of the Lord Chancellor *King*.

B b 2

and

and if so, to set it forth. And the plaintiff to make himself proper in a court of equity, had charged in his bill, that the defendants refused to let him have a sight of the deeds; and that they threatened, if he brought an ejectment, to set up some old incumbrances to bar it. The question was, whether any and what estate in the testator's lands passed to the defendant by this will?

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For the plaintiff it was said, that there were no words in the will that could be construed to extend to the inheritance; or if any, it must be the words, *as to my temporal estate*, which (in the strictest sense) relate only to the estates of a certain duration, that are to continue for a time only, and have never been held to pass an estate of inheritance. As to the words, *all the rest and residue of my estate*, they must have relation to somewhat that went before; and there is nothing disposed of in the will before this clause, but only some legacies charged upon the personal estate. So held in the case of *Markant and Twisden*, *Abr. Eq. Ca.* 212. (g) where, notwithstanding there was the word *devise*, yet it was decreed not to pass the inheritance: whereas in the present case there is no such word as *devise*; nor even the word *heir*, *land* or *tenement*. It was farther urged, that the words of the will were not certain or positive enough to disinherit the heir; *Bowman versus Milbank*, 1 *Lev.* 130. a devise of *all to his mother* was held to be uncertain, and not sufficient to disinherit the son.

It was said on the other hand for the defendant, that even if the case would admit of any doubt, yet the plaintiff was not proper to come into this Court. That here were no mortgages, leases or trusts, that could have been set up by the defendant; which he has told the plaintiff in his answer: so that whatever

(g) *Gilb. Rep.* 30. S. C.

the plaintiff did at first, yet upon the coming in of the answer, he might safely have proceeded by ejectment.

Then as to the merits it was said, that the words *temporal estate* have been construed, and very properly, to extend to all the estates, both real and personal; and that in opposition to the word *eternal*. The word *temporal* is the same as *worldly*; and as such, it comes within the reason of the Lord *Warrington's* case, where the words were, *as to my worldly estate, I will that all my debts be paid, &c.* And by virtue of these words, *worldly estate*, it was held that his real estate was liable to his debts. But the latter clause itself would be sufficient to pass a real estate of inheritance: and so are the opinions of the Court in the old reports. There is a case in *Styles*, where the words *all my estate* were held to pass an inheritance. And another in *Skinner's Reports*, where *all my estate* passed every thing the testator had. *Hyley versus Hyley*, 3 Mod. 228. *All the remaining part of my estate.* So in 1 Chan. Cases, *Tyrrel versus Page*, 262. And in 4 Mod. 89. *Carter versus Horner*, Salk. 236. *Bridgwater versus Bolton*, 2 Vern. 564. *Murry versus Wise*, 687. *Ackland versus Ackland*, 690. *Beacroft versus Beacroft*. And likewise the case of *Awdrey versus Middleton*, in 1716. where the words were, *as to all my worldly estate, I give (some legacies) and all the rest of my goods, and chattels, and estate, I give to Middleton*; and the question was, whether the real estate passed by that will? The Lord *Cowper* held, that from the frame of the whole will the testator intended it; and accordingly decreed the real estate should pass: and that case does not vary in any particular from the present, except the word *worldly* instead of *temporal*. *All my concerns* has been held to pass a real estate, and that upon a point reserved upon a trial at an assize. So, *and whatever else I have in the world* has passed an estate of inheritance.

(286)

Lord Chancellor King, (before whom this cause was first heard). You have cited no case where the word *temporal* has been used. But to me it seems clearly to relate to every estate of this world: for, there is nothing here but what is *temporal*; every thing must have an end; and the testator certainly intended all the remaining part of his estate to go to his wife, as well real as personal. But then, whether she will take an estate for life, or in fee, I do not determine; that point is not before me. If they have a mind to try it, they must stay till she is dead.

The plaintiff (being heir at law) insisted upon trying the validity of this will at law, and likewise what would pass by it. And accordingly the *Lord Chancellor* retained the bill till they had a trial.

On the 29th of *June*, 1734. *Trin.* 8 G. 2. This cause was reheard by the *Lord Talbot*, who affirmed the *Lord King's* decree; and decreed an estate in fee simple to pass by the words of the will. (b)

See the case of *Reeves versus Winnington*, 3 Mod. 45. where a devise of all his estate was held to pass a fee by the whole Court.

(b) *Vide ante* 160. 163. and references. Also *Wheeler v. Watroone*, *Aleyn* 28. (cited) *Tufnell v. Page*, *Ambl Rep.* 182. (cited) *Hope* on the demise of *Brown v. Taylor*, 1 *Burr.* 270.

A
T A B L E
OF THE
PRINCIPAL MATTERS
CONTAINED
In the foregoing CASES.

Abatement of Suit.

THE testator pleaded, and died, this plea cannot be argued now; the executor may plead *de novo*. Page 3

Account. See Usurious Contract.

Ademption of Legacies. See Devise, sec. 28.
Legacies, sec. 4.

Administrator.

1. Administration is granted to two; one of them dies; the administration survives to the other. 127 to 129
2. *A.* devises to his grandchildren *B. C.* and *D.* 1000*l.* apiece, the interest to their use; and if any dies, to the survivors and survivor; the interest to be paid to their father to their use. *B.* dies an infant; then *C.* dies. The share which *C.* took by the death of *B.* shall not survive to *D.* but go to the father, administrator of *B.* 124 to 126

B b 4

3. A

3. A husband shall be charged as administrator to his wife, by reason of such part only of her estate as he did not reduce into possession during the coverture. *Page 173 to 175*
4. Difference between legal and equitable assets, and the application of them in this Court with respect to creditors. *220 to 226*

Advancement. See *Devise, Distribution, Portions, Settlement.*

Advowson.

Whether an advowson passes by the word *tenement*.
143 to 145

Age. See *Infant.*

Agreements.

See *Bargains, Fraud, Marriage.*

An agreement between tenant in tail and a remainder-man to divide money which was to be laid out in land and settled, carried into execution in this Court after the death of tenant in tail without issue, in favour of his executor. *271 to 274*

Ambassadors.

Of ambassadors and other foreign ministers their privilege, which they cannot waive, it being the privilege of their masters. Trade and commerce are matters of state. *281 to 283*

Answer, Plea, and Demurrer.

1. A plea put in by the testator cannot be argued after his death. *3*
2. Whe-

2. Whether the answer of a wife, without proof, shall avail her against her fine. *Page 42, 43*
3. Where an infant, in his answer to a creditor's bill, insisted that the parol ought to demur during the minority; it was ordered accordingly, although his counsel would have waived it as prejudicial to him. *198, 199*

Appointment.

1. A father has a power to appoint a certain sum for the advancement of his younger children; he has several children, and devises the whole sum to one of them, reciting that the rest were otherwise provided for by their grandfather. This is not a good appointment. *72 to 78*
2. In what case the younger child, who becomes eldest, is capable of an appointment in his favour, out of money which was provided for younger children. *93 to 96*

Articles. See **Agreements, Bargains.**

Assets.

See **Executor, Heir.**

1. Where a bond given to a kept mistress shall affect the real estate in case of a deficiency of personal assets; although as to these latter it was postponed, in point of payment, even to simple contract creditors. *153 to 157*
2. A husband shall be charged as administrator to his wife, by reason of such part only of her estate as he did not reduce into possession during the coverture. *173 to 175*
3. Difference between legal and equitable assets, and in the application of them in this Court with respect to creditors. *220 to 226*
4. For

4. For *specific legacies* see *Devise*, sec. 28.

Authority. See *Power*.

Bankrupt.

1. Where the assignees under a commission were relieved as to money paid by the bankrupt upon an usurious contract. Page 38 to 41
2. Where a bankrupt conveys the equity of redemption of his estate which was in mortgage, whether that shall bind his assignees? and how far this Court will interpose against the purchaser? 65 to 70
3. What act of the commissioners on the day of the bankrupt's death, and before notice of it, shall be held *a dealing in the commission* within the statute. 184 to 186
4. The statutes of bankrupts are to be construed beneficially for the creditors. 185, 186
5. Whether an act of bankruptcy can be purged by length of time? 243, 244
6. What creditors may petition, and have relief under the commission. 243, 244

Bargains.

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The Countess of *Ferrers v. Earl of Ferrers*, page 2 to note (b) add *Stapleton v. Conway*, 1 *Ves.* 428. The *Drapers' Company and others v. Davis*, 2 *Atk.* 212.

Clare v. Clare, page 27, to note (x) add *Knight v. Ellis*, 2 *Bro. Cha. Rep.* 570.

Bosanquett v. Dashwood, page 40, to note (s) add *Heathcote v. Paignon*, 2 *Bro. Cha. Rep.* 170. and the note to that case in page 176. of the same book.

Cotterell v. Purchase, page 62, to note (x) add *Baker v. Wind*, 1 *Ves.* 161.

Jones v. Marsh, page 65, to note (b) add *Fitzer v. Fitzer*, 2 *Atk.* 511.

Collett v. De Gols and Ward, page 66, add to the cases already cited, *Ryall v. Rowles*, 1 *Ves.* 348. *Ex parte Gulsion*, 1 *Atk.* 193. *Worsley v. Demattos*, 1 *Burr.* 467.

Menzey v. Walker, page ~~57~~⁷², to note (l) add *Burleigh v. Pearson*, 1 *Ves.* 281. *Addms v. Adams*, *Cowp. Rep.* 651.

Mallabar v. Mallabar, page 79, to note (n) add the case of *Hellier v. Tarrant*, determined by the Court of Exchequer, at the sittings after *Trinity term 1791*, which case was this.

The testator Sir *Samuel Hellier*, by his last will bearing date the 10th day of *September*, 1784, devised as follows; “ I give and devise unto my friend the Reverend “ *Thomas Shaw* of *Wolverhampton*, in the said county of “ *Stafford*, and his heirs, all and every my customary or “ copyhold messuages or tenements, lands and hereditaments, whatsoever and wheresoever, situate, lying and “ being, in the several counties of *Stafford* and *Worcester*, “ or elsewhere; and also all and every my freehold messuages or tenements, tythes and hereditaments whatsoever, “ situate, lying and being, at *Featherstone*, in the parish of “ *Wolverhampton*, and in the several parishes of *Bushbury*, “ *Brewood* and *Sharehill*, in the said county of *Stafford*; “ to hold the same and every part and parcel thereof unto “ the said *Thomas Shaw*, his heirs and assigns for ever upon “ trust, that the said *Thomas Shaw* and his heirs, shall so “ soon as conveniently may be after my decease, sell and “ dispose of all and singular the said estates, and every part “ thereof, and apply the money arising by such sale in payment and discharge of all principal monies and interest “ as shall be then due and owing to any person or persons “ whomsoever upon mortgage of any of my estates, and “ also on bond, and also all my just debts of what nature “ or kind soever. I also give and devise to the said “ *Thomas Shaw* and his heirs, all that my manor of *Broom*, “ in the county of *Stafford*, with the rights, members “ and appurtenances to the same belonging; and also “ all and every my messuages or tenements, lands and “ hereditaments whatsoever with their appurtenances, “ situate lying and being in the several parishes of *Broom*, “ *Clent*, *Bell Broughton*, *Chaddeley*, *Corbet*, *Rushock* and “ *Elmbridge*, in the said counties of *Stafford* and *Worcester*, to hold the same, and every part and parcel thereof unto the said *Thomas Shaw*, his heirs and assigns for ever, upon the trusts nevertheless, and to and for the “ intents and purposes hereafter mentioned; that is to say “ in trust in the first place, with all convenient speed after “ my decease to sell and dispose of the said manor, messuages, lands, tenements and hereditaments, and every or “ any part or parcel thereof for the best price that can be “ got for the same, and pay and apply the money arising “ from such sale, in the full payment and discharge of all “ such principal money and interest as shall then remain “ due and unpaid upon all or any of the said mortgages of “ any of my estates, and upon any of my bonds or other “ just

“ just debts and demands whatsoever, and also in the pay-
 “ ment of the several legacies or sums of money by me
 “ hereinbefore given and bequeathed, and likewise my
 “ funeral expences and the costs and charges attending the
 “ probate of this my will ; and if it shall happen that the
 “ monies to be raised by the sale of the aforesaid estates,
 “ shall not prove sufficient to pay and discharge the afore-
 “ said debts, legacies and expences, then I will and di-
 “ rect, that that deficiency shall be supplied out of the re-
 “ sidue of my estates, and as to all the rest, residue and
 “ remainder of my real and personal estate and effects
 “ whatsoever and wheresoever, and of what nature or kind
 “ soever that I have power to dispose of or am entitled to,
 “ and not hereinbefore by me otherwise effectually disposed
 “ of, I give, devise and bequeath the same, and every part
 “ thereof to the said *Thomas Shaw*, his heirs, executors and
 “ administrators, to hold the same unto the said *Thomas*
 “ *Shaw*, his heirs, executors, administrators and assigns
 “ for ever, to and for his and their own proper use and
 “ benefit.”

The devisee, as standing in the place of creditors,
 brought his bill against the heir at law of the testator to
 prove the will, and to have the estates (including the copy-
 hold) which were charged in the first instance with the pay-
 ment of debts, sold, and the debts and legacies paid ac-
 cording to the will ; and charged, that the testator had not
 surrendered the copyhold estate to the use of his will, and
 therefore that the surrender should be supplied.

The defendant, the heir at law, admitted the intention of
 the testator to be, to charge the copyhold in *the first instance*
 with the payment of debts ; but it was insisted for him that
 a court of equity, though it interposes for the benefit of
 creditors, and those who stand in their place, carries its
 interposition not a step farther than is necessary to secure
 to them the payment of their debts, and, that point being
 effected, never interferes between an heir at law, and a
 volunteer, to the disadvantage of the former ; that the
 rule which the court had prescribed to itself in cases like
 the present, was, to subject the copyhold only to make up
 what the freehold estate was found deficient to pay : it was
 then urged, that there was more than sufficient (excluding
 the copyhold, which was not surrendered) to pay all the
 debts, and therefore insisted that the surrender should not

be supplied. At the hearing of this cause it was admitted by the plaintiff that the residue of the testator's estates (exclusive of the copyhold not surrendered) was more than sufficient to pay all the testator's debts.

Lord Chief Baron. The question in this cause arises upon the will of Sir Samuel Hellier, by which he devised specific estates (including the copyhold in question) for the payment of his debts. He devised a second class of estates subject to pay what the former should be deficient to pay, and he devised the whole residue to pay so much of his legacies and simple contract debts, as the two former classes should be found deficient to satisfy. The intention of a testator is doubtless to be carried into execution if possible; but it is also clear, that if a testator expresses an intention to devise from his heir at law his estate, and his will is not executed in the manner required by law, viz. in the presence of three witnesses, or if the estate devised be a copyhold, not surrendered to the use of the will, such intent cannot be carried into execution; and it will be of no avail to say that the arrangement of the testator's bounty will be greatly disappointed, or even totally defeated, since he is not permitted by law to do that which he intended, and consequently his intention must fail. But though the rule of law is universal upon the subject, yet in certain cases, and under certain circumstances a court of equity by its power over the conscience of the parties interested in a copyhold estate (so devised) will interpose; not by saying that the will operates at law, but by saying to the heir at law, "you on whom the interest descends shall be bound by the trusts of the will, and shall do that which the testator's intention alone could not effect." The cases I allude to are where the copyhold is devised for a provision for a wife or children, or for payment of debts as in the case now under consideration. The present then is a devise for payment of debts, and therefore the plaintiff standing as he says in the place of creditors, calls on the heir at law to execute the trusts of the will; and I think there is no difficulty in the case arising from the circumstance of the plaintiff not having been originally a creditor, and then praying to stand in the place of creditors. It seems to me to be very fair to consider him exactly in the same light, as if the creditors were now applying to have the trusts of this will carried into execution. It has been insisted for the plaintiff, that the doctrine of
sup-

supplying the want of a surrender of a copyhold for the benefit of creditors, is not to be understood with the qualification or restriction contended for on the part of the defendant, *viz.* that a surrender is to be supplied in cases only of a deficiency of the freehold estate; but that on the contrary if a copyhold not surrendered be subject either by way of charge or devise to the payment of debts, it follows of course that the surrender is to be supplied, and that the copyhold when the surrender is once supplied, becomes then on a footing with every other estate, and will be applied *pari passu* with the other estates charged with the payment of debts. But they touch very lightly on another part of the argument, *viz.* what is to be done with the surplus of the copyhold, if any: indeed the fact in this case is that upon an application of the estates in *the first class, pari passu*, there would be no surplus; but I think it will be necessary for them to maintain that if there had been a surplus, the devisee would have taken it, and not the heir at law. A further argument was intended to be raised for the plaintiff, on the arrangement which the testator has made for payment of his debts, and the disappointment of his general intention; if the argument stops there, it has not much weight, because it has only a voluntary devisee for its object, but if carried a little further, *viz.* to this point, that the effect of the arrangement and general intention of the testator was, that the copyhold should be first applied, and that until it had been applied the charge on the second and third classes cannot take effect at all; this argument if supported, would certainly weigh much for the plaintiff, and indeed would be decisive. Another argument was that the simple contract creditors would be deprived of the payment of their debts; but this is only the former argument in other words, unless it is determined that the residue would not be sufficient to pay the simple contract creditors, but it is now admitted that the residue of the testator's estates (exclusive of the copyhold) will be sufficient for the payment of *all* his debts. A great number of cases were cited; but the cases material to be considered are those in which it is clear a court of equity will interpose, supposing there was a necessity for its interposition from the circumstances of there being creditors to be satisfied, or a wife and children provided for; and in the examination of these cases, the matter to be enquired into seems to be, to what extent has a court of equity carried its interposition? It has determined that if creditors happen to have any interest in

the devise, the devise shall take effect, but not beyond that point to which the interest of creditors has a relation; and consequently a court of equity will not interpose further than is necessary to secure to creditors the payment of their debts, and will leave the residue of the same interest to go in that channel in which the whole interest would have gone, if the devise had been in favour of a volunteer, in which case there would have been no doubt at all, but the devise would have been void, and the heir at law taken the whole. Now,

I take it to have been pretty uniformly determined in courts of equity, since the decision of *Mallabar v. Mallabar* by the Lord *Talbot*, that the want of a surrender of the copyhold estate is not supplied against the testator's heir at law, where the testator's other estates made liable to his debts are sufficient to satisfy those debts; and upon which proposition that whole case rests. It will follow from them, as a necessary consequence, and it certainly has been so considered by courts of equity, in many cases, that the freehold estates are first to be applied; for if they are not first applied, how are we to know whether they are sufficient, or no; it is therefore a necessary consequence that any part of such copyhold estate which shall happen not to be exhausted by the debts, shall be considered as remaining untouched by the court of equity supplying that want of surrender, and shall go to the heir; for if the whole so devised is to remain with the heir, if not wanted, it will be difficult to find a reason why *a part*, if not wanted, should not also remain with the heir. This is not a mere speculative consequence; the cases of *Welch v. Cook*, in 1745 or 1746, of *Backridge v. Slater*, at the Rolls 1766, and of *Masters v. Gowell* before the present Lord Chancellor, 10th November 1790, are to the same effect: in these cases in particular the freehold and copyhold estates were devised for the payment of debts and legacies, and the copyhold (not surrendered) was applied to satisfy such debts as the freehold would not extend to pay, and the surplus of the copyhold decreed to go to and remain with the heir at law to the disappointment of that part of the devise, which meant to subject the copyhold as well to the payment of legacies as of debts. If it was demonstrated that the second and third classes of the testator's estates were so entirely auxiliary to the first class, that unless the first class was first applied to the payment of debts, the
estates

estates comprized in the second class could not be applied at all, the principles I have been urging would oblige me to conclude that the want of a surrender ought to be supplied in the present case, for that otherwise the creditors would lose their debts. I put it to the Solicitor General, whether he would argue that proposition; he did not argue it, and he put a case upon it which was a very clear one, but unfortunately for him it was not the case now under consideration. He supposed a testator indebted to the extent of a given sum, viz. 1200*l.* charged his estates in the first class with 400*l.* his copyhold not surrendered with 300*l.* and the rest of his estates with 500*l.*: I agree with him that in that case the want of a surrender must be supplied, because otherwise the creditors to the amount of 300*l.* would lose their debts, for there is no other provision; and indeed I can imagine that this testator might have some calculation of this kind in his mind, when he divided his estates into classes: but the difference is this, in the case put, the testator has set down his calculation, and has in express terms proportioned the charges upon his estates accordingly, but in the present case, it is but conjecture what specific proportions he meant to throw on the particular parts of his estates, and he has made the second class of his estates liable indefinitely to make good what the estates comprized in the first class should fall short. Another case was put, viz. suppose the testator had devised in the first class estates to which he had no title, it was agreed that the estates comprized in the second class, must have made good the deficiency. Now, the present is that very case, for this testator had no disposing power over the copyhold in question, not having surrendered it to the use of the will; but it is said that this defect in his title was only a defect in form, and not in substance; on the contrary, so substantial was the defect, that the devise became void to all intents and purposes, not only at law, but also in equity, except in the particular cases I have already noticed in which a court of equity will supply the defect, viz. in favour of creditors, or a wife or children left unprovided for.

It will be necessary in this place to make a few observations upon the case of *Harris v. Ingledew*, 3 *P. Will.* 91; and certainly in that case the Master of the Rolls, did on great consideration decree that freehold and copyhold estates (not surrendered) should be applied for the benefit of

of creditors *pari passu*. This decision has been relied upon as in point for the plaintiff; and undoubtedly if this is to be understood to be a case in which a court of equity interposed to supply the want of a surrender for the benefit of the creditors, and then that the copyhold is to be applied equally with the freehold, it is a case (though not in point) of some weight with the plaintiff, and this without driving the plaintiff to the necessity of arguing from the will: but if this is to be considered as a case in point, it is somewhat extraordinary that Lord Talbot in *Mallabar v. Mallabar* (which was decided in *Easter* term 1735, within five years after *Harris v. Ingledew*) should have taken the case to be so clearly the other way as to dismiss the plaintiff's bill, and with costs, from some circumstances in which he thought the party had not behaved well, and also that the other decisions which I have before noticed should ever have obtained, the same being altogether evidently in direct opposition to the principle of this case of *Harris v. Ingledew* so understood. It leads me therefore to suspect that in this case either the principle of it is misunderstood by us, or that there is something in the report of that case not perfectly correct: but however it cannot be denied but that the opinion of the Master of the Rolls, does stand in some degree of opposition to Lord Talbot, and the other judges in equity: I say in some degree of opposition, for there are circumstances of considerable weight, which distinguish this from the other cases: the Master of the Rolls certainly laid the stress upon two circumstances. 1st. That the whole estate was devised to volunteers, some to the heir, with other estates, in which respect the heir would be a volunteer. 2d. That the whole estates were charged with payment of debts, and that the respective devisees could take only after the debts were paid; but upon the whole, if the case of *Harris v. Ingledew* cannot be reconciled with the subsequent cases, it may be said it has been over-ruled by them, and in my judgment over-ruled rightly. A court of equity if it interposes at all, ought to interpose only for objects who have a particular merit in the judgment of a court of equity; and it seems perfectly reasonable, nay I think absolutely necessary, that those objects should be confined, lest the court should break in upon the common law unnecessarily.

Upon

Upon the whole, I am of opinion that the defect of the surrender in this case ought not to be supplied, and therefore the bill must be dismissed, and being against an heir at law, with costs.

The rest of the Barons concurred.

Proof v. Harris, page 116, to note (s) add *Sanderfon v. Glafs*, 2 Atk. 296. *Powell v. Knowles*, 2 Atk. 224.

Fort v. Fort and Blomfield, page 171, to note (u) add *Sir James Lowther v. Lord Charles Cavendish*, Ambl. 356.

Rudge v. Barker, page 124 to the cases already cited add *Worlidge v. Churchill*, at Westminster, Hil. 1792, coram Mr. Jus. Buller, sitting for the Lord Chancellor. *Edward Worlidge* by his will, gave, devised and bequeathed all his real and personal estate to his three executors upon trust to sell the same, and to lay out the monies arising therefrom after payment of his debts and legacies in government security, in trust for the benefit of his children *Rosalba*, *Edward*, *William* and *John Worlidge*, to be equally divided amongst them on their attaining the ages of twenty-one years, but if any of them should happen to die before attaining such age of twenty-one years, then such deceased child's share to go to the survivors or survivor of them; and in case all the said four children should happen to die before attaining the age of twenty-one years, and leave *Mary Worlidge* (another of the testator's daughters, and for whom he had provided otherwise by his will) living, then he directed his said trustees to pay her the interest of such trust money, from time to time as the same should grow due, and after the decease of all, subject as aforesaid, he gave and bequeathed the said trust-money to the children of his late uncle, to be equally divided between them.

John Worlidge, one of the children named in the will, died an infant in the testator's life time, by which his share in the residue of the testator's estates survived amongst his two brothers and sister *Rosalba*.

In 1783, *William*, another of the children died, having survived the testator, but did not attain his age of twenty-one years; the defendant *Townsend* administered to him, and thereby became his personal representative.

After-

Afterwards in 1786, *Rosalba* died at the age of eighteen years, having made her will, and appointed the defendant *Porter* sole executor of the same.

The plaintiff *Edward Worlidge* having attained his age of twenty-one years, brought his bill to have the usual accounts taken, the trusts of the will carried into execution, and the residue of the testator's estates paid to him, insisting, that he was entitled thereto, as being the only surviving child of his father, the said testator, who had attained his age of twenty-one years. And,

The question was, whether the shares which *William* and *Rosalba* had taken respectively by survivorship upon the death of their brother *John*, should survive to the plaintiff, as well as their original shares in the residue abovementioned, or whether their shares so taken by survivorship should go to the defendants, *Townsend* and *Porter*, their respective personal representatives?

Mr. *Jus. Buller* was of opinion that the shares taken by survivorship, as well as the original shares of *William* and *Rosalba*, survived to the plaintiff, and decreed accordingly.

Brown v. Selwin, page 240, to the cases already cited, add *Del Mare v. Rebello* and others, at *Westminster*, February 3d, 1792, coram Lord Chancellor.

Jacob del Mare made his will, whereby he bequeathed unto the defendant *Rebello* and two other persons, and the survivors and survivor of them all his the said testator's government securities, annuities or funds, in the Bank of *England*, which should be standing in his name at the time of his death, unto all the children of the said testator's sisters, *Estrella del Mare Jalsen* and *Reyna del Mare* to be equally divided between them, share and share alike, for and during their respective lives. And he directed that from and after the death of either of his said sister's children, the issue or children of such children so dying should be entitled to their parent's share.

The testator at the time of his death left three sisters, viz. *Estrella del Mare Jalsen*, wife of *Zaccarias Jalsen*, *Reyna del Mare*, and *Rebecca del Mare*, wife of *Samuel del Mare*.

Reyna

Reyna del Mare, one of the sisters named in the will, had at the time the same was made, and many years before, adopted the Roman catholic religion, become a professed nun in a convent at *Genoa*, and had besides been baptized in the year 1755, when she was about fifteen years old, according to the rites of that religion, by the name of *Maria Hyeremina*.

The plaintiffs, who were the children of *Samuel* and *Rebecca del Mare*, brought their bill to have an equal share of the interest and dividends of the residue of the testator's effects (amounting to a large sum) paid to them jointly with the children of *Estrella Jalsen*; and it was urged for them, that *Reyna del Mare* having changed her name, and become a nun professed at the time of making the will, and having no children, nor likely ever to have any, she could not be supposed to have been in the contemplation of the testator, and to be the sister for whose children he was anxious and intended to provide. And in support of this argument, parol evidence was offered to shew that the testator had on many occasions declared his intention to provide for the children of his sister *Rebecca*, and that the name of *Reyna* was inserted in the will through mistake, and contrary to the intention of the testator; further, that the testator had always corresponded in a friendly manner with *Samuel* and *Rebecca del Mare*, the father and mother of the plaintiffs, but that he had held no correspondence with *Reyna*, now *Maria Hyeremina*.

On the other hand it was insisted for the defendant *Jalsen*, who was one of the children of the testator's sister *Estrella*, that the testator could not be mistaken in the names of his sisters, and that as *Reyna* is positively named in the will, and there is a person to answer that description, and capable of taking under it, the court could not give a different construction to the express words of the will; and that consequently, as *Reyna* had no children, the whole residue belonged solely to the children of *Estrella*.

The question was, whether the parol evidence offered on the behalf of the plaintiff was admissible under the circumstances of this case? But the Lord Chancellor refused to admit it, or make any reference, and dismissed the bill, saying, he could not presume from such evidence, that the testator had inserted his sister *Reyna*, for *Rebecca*, through mistake.

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F I N I S.

Ex. W. E. F.

4/29/69